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IN THE

Supreme Court of the United States

CONSOLIDATED FREIGHTWAYS, INC.,
Petitioner,

v.

LLOYD W. CRAMER, *et al.*
Respondents.

CONSOLIDATED FREIGHTWAYS CORPORATION, *et al.*
Petitioners,

v.

GUILLERMO ALFARO, *et al.*
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the divided en banc Ninth Circuit properly held—in conflict with decisions of this Court and those of other federal courts of appeals—that state law privacy claims based on an employer's use of video surveillance to detect and deter drug use in the workplace are not preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, even though the collective bargaining agreement at issue expressly addresses and contemplates the use of video surveillance in the workplace.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are Consolidated Freightways, Inc., Consolidated Freightways Corporation, and CNF Transportation, Inc. CNF Transportation, Inc., formerly known as Consolidated Freightways, Inc., has no parent corporations and no publicly-held company owns 10% or more of its stock. Consolidated Freightways Corporation has no parent corporations and no publicly-held company owns 10% or more of its stock.

This case arises out of two actions consolidated in the Ninth Circuit below: *Cramer, et al. v. Consolidated Freightways, Inc.*, No. 98-55657, and *Alfaro, et al. v. Consolidated Freightways Corporation, et al.*, No. 98-56041. Consolidated Freightways, Inc. was the defendant-appellee in *Cramer*. Plaintiffs-appellants in *Cramer* were Lloyd W. Cramer and Daniel E. Lipich. Defendants-appellees in *Alfaro* were Consolidated Freightways Corporation, CNF Transportation, Inc., aka Consolidated Freightways, Inc., Mark Epstein, Douglas Schuster, and Doe Security Installation Company. Plaintiffs-appellants in *Alfaro* were Dennis R. Blevins, Ray R. Casio, Steve Cunningham, Rick Dewoody, Alejandro Garcia, David V. Garcia, Raul C. Garcia, James A. Greco, Bruce A. Harvey, John K. Hatfield, Robert W. Hatfield, Lee A. Ingram, Zeno King, Jr., John L. Lacroix, Gregory A. Landavazo, Melvin Leo Lewis, Enrique Lopez, Herbert Marcus, Ignacio V. Ochoa, Brian K. Pagne, Manuel Parra, James A. Proitte, Carlos Rivera, Harold James Taylor, Jr., Thomas A. Scott, David W. Stephens, J.B. Stewart, Alfonso Wagner, Larry A. Wells, Robert P. Williams, Eric J. Wright, William A. Yesford, Miguel Abarajas, Sandra Ray Ambrose, Guillermo Amesola, Abelardo Apuan, Michael Vincent Arbanas, Carlos Argandora, Jose Abriero, Marcario Acellano, Fernando Avila, Michael E. Bannan, Arnold A. Barajas, Robert Barras, Mike Bartley, David Barton, Jan K.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Consolidated Freightways, Inc., Consolidated Freightways Corporation, and CNF Transportation, Inc. (collectively, "Consolidated"), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the Ninth Circuit is reported at 255 F.3d 683 and reproduced in the appendix hereto ("App.") at 1a. The order amending the en banc opinion of the Ninth Circuit is reproduced at App. 35a. The panel opinion of the Ninth Circuit is reported at 209 F.3d 1122 and reproduced at App. 40a. The orders of the District Court are reproduced at App. 72a, App. 75a, and App. 79a.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 15, 2001. App. 1a. The jurisdiction of the Ninth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides in pertinent part: "[The] Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. [29 U.S.C. § 185(a).]

Section 653n of the California Penal Code provides in pertinent part:

> Any person who installs or who maintains * * * any two-way mirror permitting observation of any

restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or hotel room, is guilty of a misdemeanor.

INTRODUCTION

Section 301 of the LMRA establishes a federal policy that disputes arising out of labor contracts shall be resolved by reference to a uniform body of federal labor law. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 209 (1985). This Court has long recognized that "[i]f the policies that animate § 301 are to be given their proper range, * * * the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Id.* at 210. Accordingly, this Court has held that "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law * * * is pre-empted." *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-406 (1988). This rule ensures uniform interpretation of collective bargaining agreements, and is essential to the "smooth functioning" of the collective bargaining process—"the keystone of the federal scheme to promote industrial peace." *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

Respondents—employees bound by the terms of a nationwide collective bargaining agreement ("CBA")—brought state law claims against Consolidated alleging that the use of video surveillance invaded their privacy. A panel of the Ninth Circuit initially held that respondents' claims were preempted by § 301 because "adjudication of [those] claims * * * depends on the reasonableness of [respondents'] expectations, and this, in turn, depends on the extent to which they may have bargained away their privacy interests." App. 45a. A divided en banc panel of the Ninth Circuit subsequently reversed, holding that respondents' claims were not "even arguably" covered by the CBA governing the conditions of their employment, despite the fact that the CBA expressly contemplates the use of video surveillance in the

workplace. To reach that conclusion, the majority reasoned that it could "look to a CBA to determine whether a plaintiff's claim necessarily implicates its terms without 'interpreting' the agreement, as that word is used in the context of § 301 preemption." App. 16a.

The Ninth Circuit's en banc decision—"clarif[ying] and correct[ing]" that circuit's "approach to § 301 preemption," App. 6a, 13a—conflicts in numerous respects with decisions of this Court and other federal courts of appeals. Indeed, every other court of appeals to consider the issue—including, previously, "in a long line of cases," App. 50a, the Ninth Circuit itself—has held that claims based on workplace privacy and dealt with in a CBA are preempted by § 301. Moreover, as the dissent below recognized, "Consolidated's argument [in favor of preemption] is *much stronger* than arguments other courts have accepted for the purposes of finding preemption," including the Seventh Circuit "in a case remarkably similar to this one." App. 29a (emphasis added) (citing *In re Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992)). This Court should grant certiorari to resolve the multiple conflicts created by the decision below in this important area of federal labor law.

STATEMENT OF THE CASE

Background. Consolidated has trucking operations in each of the fifty States. Federal law prohibits truck drivers and other employees from reporting for or remaining on duty when unlawfully using drugs, and requires testing for drug use under specified circumstances, including when an employer has reasonable suspicion to believe that such employees are unlawfully using drugs. *See* 49 C.F.R. §§ 382.101, *et seq.* This federal scheme reflects serious concerns about drug abuse in the transportation industry, which Consolidated shares. Indeed, as the District Court below recognized, "the use of drugs is a very important safety issue for a national trucking company of this character

which has perhaps hundreds of trucks, vehicles on the roads of the country at all times, large vehicles capable of doing extensive damage when operated by drivers under the influence of drugs." AER 303.[1]

All truck drivers (as well as other non-supervisory personnel) are subject to a nationwide CBA negotiated with the International Brotherhood of Teamsters, Local No. 63.[2] The CBA comprises a National Master Freight Agreement ("Master Agreement") and five Western States Area Supplemental Agreements. The CBA contains provisions specifically addressing the problem of employee drug abuse and the use of video surveillance. Article 35, Section 3 of the Master Agreement expressly acknowledges the parties' "concern * * * over the growth of substance abuse," AER 43, and prescribes drug testing procedures and conditions under which employees may be required to undergo testing, including probable suspicion testing based on the observations of supervisors. Article 26, Section 2 of the Master Agreement, entitled "Use of Video Cameras for Discipline and Discharge," provides that an employer "may not use video cameras to discipline or discharge an employee for reasons other than theft of property or dishonesty," and prescribes a procedure to be followed "[i]f the information on the video tape is to be used to discipline or discharge an employee."

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[1] Appellants' Excerpts of Record and Appellee's Supplemental Excerpts of Record filed below in the *Cramer* action are cited as "AER" and "SER," respectively.

[2] The nationwide effect of the CBA extends far beyond this case. At least nine other major freight carriers (as well as many smaller ones) are signatories to the CBA. The Motor Freight Carrier Association estimates that in 1998 the Teamsters distributed approximately 125,000 ballots to union members covered by the CBA, and that revenue from shipments transported under the CBA exceeded $9.5 billion.

App. 15a n.5.[3] The CBA also establishes a grievance procedure for resolving disputes arising thereunder.

In an attempt "to stop what was believed to be an on-going and significant drug abuse/sales problem" involving employees in safety-sensitive positions at a terminal in Mira Loma, California, SER 1, video cameras were installed behind two-way mirrors in the men's restrooms. Employees were warned that they were generally under surveillance at the terminal by six large signs placed in and around the terminal which read, "NOTICE! 24 Hour Surveillance Recorded on Videotape." In September 1997, employees discovered surveillance equipment behind a two-way mirror in a men's restroom, and notified the Riverside County Sheriff's Department. Section 653n of the California Penal Code prohibits the installation or maintenance of "any two-way mirror permitting observation of any restroom." Following an investigation, however, the District Attorney elected not to file charges against Consolidated, concluding that "the conduct involved was not motivated by an intent that would warrant criminal prosecution." App. 32a n. 7. As the District Attorney noted, "the investigation revealed that the video cameras were directed away from the urinals and toilets and that no one was ever videoed while actually using those facilities or in any state of undress." SER 1.

Shortly after the authorities were notified, the union filed a grievance on behalf of all its members employed at the Mira Loma terminal, "protest[ing] the company's use of video surveillance in the restroom at the Mira Loma facility." AER 58. The grievance specifically invoked four separate provisions of the CBA—including Article 26, addressing video

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[3] This section further provides that "[w]here a Supplement imposes more restrictive conditions upon use of video cameras for discipline or discharge, such restrictions shall prevail." App. 15a n.5. None of the Supplemental Agreements places additional restrictions on the use of video surveillance. App. 27a.

surveillance. A few days later, Respondent Lloyd Cramer, a truck driver employed at the Mira Loma terminal, brought a class action in state court alleging invasion of privacy on behalf of all "individuals lawfully on the premises * * * who had a reasonable expectation of privacy while using [Consolidated's] restrooms." App. 47a. On the heels of that suit, Respondent Guillermo Alfaro, another employee, and 281 others brought a separate action in state court alleging invasion of privacy and infliction of emotional distress.

District Court Proceedings. Consolidated removed both actions to federal court on the ground that respondents' claims were preempted by § 301 of the LMRA because they required interpretation of the CBA, and then moved to dismiss the actions (consolidated by the District Court for argument) on the ground that respondents' exclusive remedy lay in the CBA's grievance procedure. Respondents filed a motion to remand. The District Court determined that all employee claims were preempted by the CBA, and that arbitration was the exclusive remedy for resolving disputes arising thereunder. App. 76a-77a. The court therefore denied the motion to remand as to the employee claims, granted Consolidated's motion to dismiss as to all but nine plaintiffs in the *Alfaro* action who were not employees, and remanded the non-employee claims to state court. App. 72a-80a.

The Panel Decision. A divided panel of the Ninth Circuit affirmed. In doing so, the panel followed "a long line of cases" in which the Ninth Circuit had previously held that "employee suits for violation of privacy interests arising under California law are inextricably intertwined with the [CBA]." App. 50a.[4] As the panel explained, "under Califor-

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[4] *See Schlacter-Jones* v. *General Tel. of Cal.*, 936 F.2d 435 (9th Cir. 1991); *Stikes* v. *Chevron, USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *Utility Workers of Am.* v. *Southern Cal. Edison Co.*, 852 F.2d 1083 (9th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *Laws* v. *Calmat*, 852 F.2d 430 (9th Cir. 1988).

nia law plaintiffs asserting an invasion of privacy claim must show that they had a personal and objectively reasonable expectation of privacy that was infringed by an unreasonable intrusion." App. 51a. Because "consent is normally a defense to a privacy action," whether an employee had a reasonable expectation of privacy "depends on the deal struck between labor and management." App. 51a (quotation omitted). Accordingly, "in this case as in [the others], * * * the reasonableness of the employees' expectations of privacy will depend upon the level of management oversight allowed in the collective bargaining agreement and the extent to which this particular surveillance exceeds what [respondents] could reasonably expect." App. 52a.[5]

In so holding, the panel rejected the argument that respondents' claims were independent of the CBA, and thus outside the preemptive reach of § 301, because the CBA could not authorize conduct that was—in respondents' view—illegal under § 653n of the California Penal Code. The panel noted that "privacy rights can be altered or waived under California law and must be considered in context." App. 53a-54a. Thus, "[g]iven the negotiable right at issue here, there [was] no basis for concluding that a different analysis applies to a privacy claim founded on arguably illegal, by contrast with legal but also invasive, activities." App. 55a.

The panel also rejected the argument that respondents had a reasonable expectation of privacy as a matter of law because—in their view—the surveillance was illegal, reiterating that California "expressly conditions the right to privacy on consent and circumstances." App. 56a. Thus, "while § 653n undoubtedly accords with a person's reasonable

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[5] As the panel observed, respondents' emotional distress claims are merely " 'parasite' claims that track the principal claim for invasion of privacy" because "[w]hether the employees consented to surveillance affects the extent to which the surveillance [was] 'outrageous.' " App. 57a. Thus, if respondents' invasion of privacy claims are preempted, so are their emotional distress claims.

expectations of privacy in general—and probably with the expectations of Consolidated's employees—[the panel could not] say that [the statute] absolutely does without examining the extent to which surveillance, which the [CBA] assumes will occur, is conducted at the terminal with the employees' knowledge and consent." App. 56a.[6]

Judge Fisher dissented, stating that "[t]he majority's conclusion that the plaintiffs' right to be free from two-way mirror observation was 'negotiable' * * * lies at the heart of my disagreement with its analysis." App. 64a. In his view, respondents' claims were "based on conduct that is per se illegal (in other words, not subject to waiver by consent or otherwise by the citizens of California)." App. 69a. Thus, he concluded, respondents "as a matter of law had a reasonable expectation of privacy," and "to that extent their privacy claims are not preempted by § 301." App. 67a.

The En Banc Decision. A divided en banc panel of the Ninth Circuit reversed. The majority concluded that respondents' claims were not "even arguably covered by the [CBA]," and were therefore "independent of the CBA" and "not subject to § 301 preemption." App. 6a. As the majority understood this Court's precedents, a court may "look to" a CBA "to determine whether a plaintiff's claim necessarily implicates its terms without 'interpreting' the agreement." App. 16a. Because—in the majority's view—a "cursory examination" of the CBA revealed "that it does not contem-

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[6] Although respondents "principally rel[ied]" upon § 653n, App. 51a n.9, (even though they did not allege a violation of that statute in their respective complaints), they also contended that that the challenged surveillance violated other provisions of the California Penal Code prohibiting the viewing of the interior of a bathroom (§ 647(k)), eavesdropping by means of electronic recording devices (§ 632), and the possession of eavesdropping devices (§ 635). Because respondents' claims based on those provisions also "hinge[d] on the absence of consent," the panel concluded that those claims were likewise preempted. App. 52a n.9.

plate the surreptitious videotaping [respondents] challenge in their state law claim[s]," the court held that it "need not 'interpret' the CBA" to resolve respondents' claims. App. 16a, 18a. In so holding, the majority expressly "disavowed" the "long line of authority" relied on by the previous panel, concluding that those cases incorrectly "held or implied that preemption was proper because of the mere possibility that the subject matter of the claim was a proper subject of the collective bargaining process, whether or not specifically discussed in the CBA." App. 15a, 20a, 45a.

Adding further to the scope of its decision, the majority held in the alternative that respondents' claims would still be preempted "[e]ven if the CBA did expressly contemplate the use of two-way mirrors to facilitate detection of drug users." App. 18a. In the majority's view, "installation of two-way mirrors is immutably illegal, and freedom from the illegality is a nonnegotiable state-law right." App. 19a (quotation and alteration omitted). "By definition, therefore, [respondents] were reasonable in expecting to be free of the two-way mirrors and hidden video cameras installed in the restrooms," and a court "need not interpret the CBA" to determine whether their rights were violated. *Id.*[7]

Judge O'Scannlain dissented. "Because the CBA expressly provides for video surveillance of its covered employees," he observed, "it cannot be so cavalierly ignored as the majority holds." App. 25a. As he explained, the CBA "makes explicit two things." App. 27a. First, respondents "con-

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[7] In a concurring opinion, Judge Tallman expressed dismay over the majority's alternative holding, observing that it "threatens the ability of similarly situated parties to negotiate legitimate expectations on privacy," as well as "multi-state employers' ability to fulfill federally mandated safety requirements by negotiating with their employees." App. 23a-24a.

More than two months after the en banc Ninth Circuit filed its decision, the court *sua sponte* issued an amending order deleting this statement in the decision: "it is well established in California that illegal provisions of a contract are void and unenforceable." App. 39a.

sented to be videotaped by Consolidated, subject to the restriction that the videotaping was for the purpose of 'discipline or discharge' related to 'theft of property or dishonesty.' " *Id.* Second, respondents "contemplated that they might want to place additional restrictions on Consolidated's use of video cameras through the mechanism of a 'Supplement,' " although they did not do so here. *Id.* "Because the contract does not restrict the use of video cameras to areas other than the restroom, or to positions other than behind a two-way mirror," "one could very easily make a reasonable argument that [the CBA] should be interpreted to mean that [respondents] consented to Consolidated's behavior." App. 27a-28a. Thus, he concluded, "to resolve [respondents'] claim[s], the Court must resort to interpretation of the CBA to determine whether this reasonable argument is a winning one." *Id.*

In reaching this conclusion, Judge O'Scannlain pointed out that "Consolidated's argument in this regard is much stronger than arguments other courts have accepted for the purposes of finding preemption." App. 29a. In particular, he noted that "in a case remarkably similarly to this one," the Seventh Circuit held that privacy claims based on an employer's use of video surveillance were preempted "even though there was 'not one word in the compact about cameras, locker rooms, or surveillance in general.' " *Id.* (quoting *In re Amoco,* 964 F.2d at 709-710). "Needless to say," Judge O'Scannlain observed, "Consolidated's argument regarding the interpretation of the CBA in this case, which does expressly authorize videotaping, is far more plausible." App. 29a-30a.

Judge O'Scannlain also disagreed with the majority's alternative holding that respondents had a reasonable expectation of privacy as a matter of law because—in the majority's view—the challenged surveillance violated § 653n.[8] As he

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[8] As Judge O'Scannlain observed, "it is far from clear whether Consolidated's videotaping violated § 653n," as the California Supreme Court has indicated that the statute would appear to prohibit only

explained, "there simply is no decision of the California Supreme Court which holds as a matter of law that one has a subjective expectation of privacy from illegal intrusions to which one has consented." App. 32a. Indeed, as he put it, such a decision would "lead to the ridiculous situation in which I could invite someone to videotape me behind a two-way mirror, only to then turn around and sue that person for violating my right to 'privacy.' " *Id.* Thus, regardless of whether the surveillance was illegal, respondents' claims required "resort to interpretation of the CBA to determine whether they consented to the videotaping." *Id.* In conclusion, Judge O'Scannlain emphasized that preemption of respondents' claims "does not mean, of course, that [respondents] have no remedy at all," but only "that [they] must pursue their remedies under federal law rather than state law." App. 33a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S EN BANC DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND THOSE OF OTHER FEDERAL CIRCUITS.

1. a. Nearly a half-century ago, this Court established that § 301 not only confers jurisdiction on federal courts to hear suits involving violations of CBAs, but also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 451

" 'clandestine, *unexpected*' viewing." App. 31a n.7 (quoting *In re Deborah C.*, 635 P.2d 446, 452 (Cal. 1981)) (emphasis added by dissent). Thus, "one of the modes of 'observation' from which § 653n does not make [respondents] 'immune' is an 'expected' viewing from behind a two-way mirror." *Id.* "Such a viewing would be 'expected' if [respondents] consented to it in the CBA." *Id.* Any other interpretation "would allow the State to prosecute criminally someone who erects a two-way mirror at the *invitation of* the person he is videotaping." *Id.*

(1957). This Court also determined that to avoid "[t]he possibility that individual contract terms might have different meanings under state and federal law"—which would "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements"—"federal labor law must be paramount in the area covered by the statute." *Lucas Flour*, 369 U.S. at 103.

Since then, this Court has extended the preemptive reach of § 301 beyond state law claims for contract violations to *any* state law claim that "depends upon the meaning of a collective-bargaining agreement" for its resolution. *Lingle*, 486 U.S. at 406. As the Court explained in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 211:

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breach of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

In *Allis-Chalmers*, the Court concluded that § 301 preempted a state law tort action based on an employer's bad faith handling of a claim under a disability plan included in a CBA. Although the CBA did not "expressly" provide that payments had to be made in a timely manner, the Court held that the action was preempted because the CBA might include an implied obligation to do so, and "it [was] a

question of federal contract interpretation whether there was [such] an [implied] obligation under [the] labor contract * * *, and, if so, whether [the employer] breached that implied provision." *Id.* at 215. In concluding "that the parties contracted only for the payment of insurance benefits, and that questions about the manner in which the payments were made [were] outside the contract," *id.*, the state court below had made "assumptions about the scope of the contract provision which it had no authority to make under state law." *Id.* at 214. As the Court admonished, "[t]he assumption that the labor contract creates no implied rights is not one that state law may make." *Id.* at 215.

Similarly, in *International Brotherhood of Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987), the Court held that § 301 preempted a state law tort claim brought against a union for breach of its duty to provide a safe workplace. The Court noted that the CBA and ancillary agreements "contain[ed] provisions on safety and working requirements for electrical apprentices on which [the plaintiff] could try to base an argument that the Union assumed an implied duty of care." *Id.* at 861. The Court then reasoned that "[i]n order to determine the Union's tort liability, * * * a court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that [the plaintiff] was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged * * * in her complaint." *Id.* at 862. Thus, the Court concluded, "in this case, as in *Allis-Chalmers*, it is clear that 'questions of contract interpretation * * * underlie any finding of tort liability.' " *Id.* (quoting *Allis-Chalmers*, 471 U.S. at 218).

b. The Ninth Circuit's en banc decision in this case directly conflicts with these precedents. Resolution of respondents' claims plainly requires an interpretation of the

CBA in this case.[9] To prevail on their claims for invasion of privacy, for instance, respondents would have to show a "reasonable expectation of privacy on [their] part" in the restrooms at the Mira Loma terminal. App. 30a n.6 (quoting *Hill* v. *NCAA*, 865 P.2d 633, 655 (Cal. 1994)). Whether respondents, through their union, consented to the challenged video surveillance " 'obviously affect[ed] [their] expectations.' " App. 33a (quoting *Hill*, 865 P.2d at 655). Accordingly, to resolve respondents' claims, a court would have to determine, first, whether respondents consented to video surveillance in the CBA, and, second, the nature and scope of that consent. *See Hechler*, 481 U.S. at 862. Thus, in this case, as in *Allis-Chalmers* and *Hechler*, "it is clear that 'questions of contract interpretation * * * underlie any finding of tort liability.' " *Id.*

The majority below reached a contrary conclusion, holding that it "need not 'interpret' the CBA to see that it does not contemplate the surreptitious videotaping plaintiffs challenge in their state law claim." App. 18a. That conclusion simply cannot be squared with this Court's § 301 jurisprudence, not to mention basic principles of contract law. Examining a contract to determine whether a particular type of video surveillance is permitted by a provision that *expressly* contemplates the use of video surveillance is no less an interpretive endeavor than examining a contract to determine whether it contains an *implied* duty to make payments in a timely manner (*Allis-Chalmers*) or to provide for a safe workplace (*Hechler*).[10] Indeed, the fact that the CBA here

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[9] Indeed, the union, representing respondents, filed a grievance alleging that the video camera provisions of the CBA had been violated and thus clearly believed that the CBA was implicated by the challenged surveillance.

[10] The CBA plainly contemplates the use of video surveillance in the workplace, since the prohibition against certain uses of videotapes (for reasons other than "theft of property or dishonesty," App. 15a n.5) and

expressly contemplates the use of video surveillance makes this an even stronger case for preemption than either *Allis-Chalmers* or *Hechler*. Determining the meaning and scope of an express provision of a contract is the very essence of contract interpretation.[11]

By holding that it is possible to "look to" a CBA "to determine whether a plaintiff's claim necessarily implicates its terms without 'interpreting' the agreement," App. 16a, the majority did an end run around this Court's rule that § 301 preempts all state law claims that require interpretation of a CBA. The majority ostensibly based its "look to" approach on this Court's decisions in *Lingle* v. *Norge Division of Magic Chef, Inc.*, *supra*, and *Livadas* v. *Bradshaw*, 512 U.S. 107, 122 (1994). *See* App. 9a-15a. In those cases, however, this Court simply held that the "mere need to 'look to' the collective bargaining agreement for *damages* computation is no reason to hold the state-law claim defeated by § 301." *Livadas*, 512 U.S. at 125 (emphasis added). *See also Lingle*, 486 U.S. at 413 n.12 ("A collective-bargaining agreement

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the designation of procedures to be followed when videotapes are used would otherwise make no sense.

[11] As the dissent below explained, a "reasonable argument" can be made in this case that the CBA permitted the challenged surveillance. App. 28a. The CBA does not make explicit exactly where, when, or how surveillance may take place—for example, "whether Consolidated may use video cameras in the hallway, or whether Consolidated may use video cameras on a tripod." App. 27a. Instead, the CBA places "but one restriction upon Consolidated's use of video cameras," App. 28a—prohibiting the use of videotapes to discipline employees "for reasons other than theft of property or dishonesty." App. 15a n.5. "Because the contract does not restrict the use of video cameras to areas other than the restroom, or to positions other than behind a two-way mirror, one could reasonably conclude that [respondents] * * * consented to the very videotaping on which their state law privacy claim is based." *Id.* Accordingly, this is a classic case of preemption, because any determination as to whether "this reasonable argument is a winning one" requires recourse to the CBA to determine the intent of the parties. *Id.*

may, of course, contain information such as the rate of pay and other economic benefits that might be helpful in determining *damages* to which a worker prevailing in a state-law suit is entitled.") (emphasis added). Nothing in *Lingle* or *Livadas* even remotely suggests that a court may "look to" a CBA to determine whether it permits conduct upon which a claim is based without actually "interpreting" the agreement within the meaning of § 301.[12] Indeed, extending *Lingle* and *Livadas* in such a manner would severely undercut, if not entirely vitiate, the preemptive effect of § 301. By doing just that, the majority not only strayed from this Court's principles but rewrote them altogether.

c. The Ninth Circuit's decision further conflicts with this Court's precedents in another important respect. As this Court has long recognized, "collective bargaining agreements may include implied, as well as express, terms." *Consolidated Rail Corp.* v. *Railway Labor Execs.' Ass'n*, 491 U.S. 299, 311 (1989). That is because a CBA is "more than a contract." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). Rather, "it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Id.* "[T]he practices of the industry and the shop [are] equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 582.

In "clarify[ing] and correct[ing]" the Ninth Circuit's prior "approach to § 301 preemption," App. 6a, 13a, the majority below expressly "disavowed" a "long line of [circuit] author-

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[12] The majority below incorrectly stated that "[e]ven though the [*Livadas*] Court looked to the CBA to determine the *absence* of a waiver of state law protections, it concluded that preemption was not required." App. 11a. To the contrary, the *Livadas* Court did *not* "look to" the agreement to make that determination. In fact, the Court specifically noted that there was "no suggestion" of waiver in that case. 512 U.S. at 125. Therefore, "[b]eyond the simple need to refer to bargained-for wage rates in computing the penalty, the collective-bargaining agreement [was] irrelevant to the dispute." *Id.*

ity," App. 20a, 45a, which recognized that the terms of a CBA include "working condition[s] whether or not [they are] specifically discussed in the CBA," *Laws* v. *Calmat*, 852 F.2d at 433, and that claims based on such working conditions "necessarily involve contract interpretation." *Schlacter-Jones* v. *General Tel. of Cal.*, 936 F.2d at 441. In repudiating this line of authority, however, the majority plainly disregarded this Court's precedents on which those decisions are based. The resulting conflict—which implicates "a myriad of cases," *United Steelworkers*, 363 U.S. at 578—should not be tolerated by this Court.

2. Although the conflict with this Court's decisions alone suffices to warrant certiorari, *see* S. Ct. Rule 10(c), the need for review is further heightened by the irreconcilable conflict between the Ninth Circuit's en banc decision and the decisions of other federal courts of appeals that have faithfully adhered to this Court's precedents. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991).

a. To begin with, the decision below conflicts with the decisions of every circuit that has considered whether § 301 preempts claims for invasion of workplace privacy. In this respect, the en banc decision conflicts most sharply with the Seventh Circuit's decision in *In re Amoco Petroleum Additives Co.*, *supra* (Easterbrook, J.). There, as here, plaintiffs brought claims for invasion of privacy and infliction of emotional distress based on an employer's use of a hidden video camera. Even though the agreement contained "not one word" about cameras or surveillance in general, the Seventh Circuit nonetheless held that the plaintiffs' claims were preempted. 964 F.2d at 709. As that court recognized, "[e]ven agreements that do not mention surveillance expressly may deal with the subject by implication." *Id.* at 710. That is because, as noted above, " 'collective bargaining agreements may include implied, as well as express, terms.' " *Id.* (quoting *Consolidated Rail*, 491 U.S. at 311). "Implied terms include the norms of the shop," such as a " 'condition'

of employment" like privacy—"an ordinary subject of bargaining." *Id.* Thus, a court "could not award damages without first construing the collective bargaining agreement and rejecting [the defendant's] interpretation" that the CBA committed the use of video surveillance to the defendant's discretion. *Id.* at 709. *See also Brazinski* v. *Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1179 (7th Cir. 1993) (Posner, J.) (explaining that "the reason that the suit [was] deemed to arise under section 301 is * * * that the company [had] a nonfrivolous argument that the surveillance of which the plaintiffs complaine[d] [was] authorized, albeit implicitly, by [the CBA], so that the plaintiffs' claim that the surveillance invaded their privacy [could not] be resolved without an interpretation of the agreement").

As the dissent below recognized, the Ninth Circuit's en banc decision in this case cannot be reconciled with the Seventh Circuit's decision in *Amoco*. *See* App. 29a-30a. Whereas the Seventh Circuit held that § 301 preempted privacy claims based on the use of video surveillance even though the CBA was utterly silent on the subject, the Ninth Circuit held that such claims were not preempted by a CBA expressly addressing the use of video surveillance. The irreconcilability of these cases is further underscored by the fact that in reaching its conclusion the Seventh Circuit specifically relied on the "long line of [Ninth Circuit] authority" expressly "disavowed" by the majority below. App. 20a, 45a. *See Amoco*, 964 F.2d at 710.

The undeniable conflict between the decision below and the Seventh Circuit's decision in *Amoco* itself provides a compelling basis for review.[13] But the conflict is by no

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[13] *See also Hogue* v. *Holmes*, 1994 WL 258546, at *4-6 (D.N.H. 1994) (privacy claims based on video surveillance preempted even though CBA did not mention surveillance, because "the dimensions of the plaintiff's expectations of privacy * * * depend[ed] on the working conditions contemplated in the CBA"); *Sweigart* v. *Delmotte*, 1994 WL 724987, at *3-5 (E.D. Pa. 1994) (privacy claim based on personal

means limited to the Seventh Circuit. For instance, in *Jackson* v. *Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989), the First Circuit held that § 301 preempted a privacy claim based on an employer's drug testing program. Even though the CBA did not mention drug testing, the court nevertheless held that the claim was "bound up in the interstices of the Agreement," because "the dimensions of [the plaintiff's] cognizable expectation of privacy depend[ed] to a great extent upon the concessions the union made regarding working conditions during collective bargaining." *Id.* at 119. Thus, the privacy claim could be resolved "[o]nly by probing the contours of the Agreement" to "determine the rights and obligations [it] bestowed." *Id.*[14]

The conflict runs even deeper, extending to the Fourth, Fifth, and Tenth Circuits. *See Kirby* v. *Allegheny Beverage Corp.*, 811 F.2d 253, 256 (4th Cir. 1987) (privacy claim based on search of employee's person preempted because its resolution "would have required reference to, and interpretation of, the [CBA]" to determine "whether the employer could require such a search under the labor contract"); *Clark* v. *Newport News Shipbuilding & Dry Dock Co.*, 937 F.2d 934, 938 (4th Cir. 1991) (parties' rights with respect to drug testing could "be resolved only by reference to the [CBA] and its express and implied provisions"); *Strachan* v. *Union Oil Co.*, 768 F.2d 703, 705 (5th Cir. 1985) (claims based on drug testing and searches of employee's person, car, and locker were "grist for the mill of grievance procedures and arbitration," where the claims involved "matters which are all part of a company claim of right under a [CBA]"); *Mock* v. *T.G. & Y. Stores Co.*, 971 F.2d 522, 530 (10th Cir. 1992)

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surveillance of bathroom stall held preempted by § 301), *aff'd*, 74 F.3d 1228 (3d Cir. 1995).

[14] Like the Seventh Circuit in *Amoco*, the First Circuit also relied on prior Ninth Circuit precedent expressly repudiated by the majority below. *See* 863 F.2d at 119-120.

(§ 301 preempted privacy claims arising out of an investigation of suspected theft and substance abuse because "[a]n analysis of whether [the employer] acted properly or not [would] inevitably require an analysis of what the [CBA] permitted").

The en banc Ninth Circuit broke with this line of decisions in holding that workplace privacy claims are not preempted by § 301. Particularly as that conflict is the direct result of the Ninth Circuit's failure to hew to this Court's precedents, it should be resolved by this Court.

b. The decision below also conflicts with numerous decisions of other circuits recognizing that § 301 preempts claims involving "a 'condition' of employment" that is "an ordinary subject of bargaining" because a CBA may deal with such matters "by implication." *Amoco*, 964 F.2d at 710. As discussed above, this rule is firmly grounded in this Court's precedents, yet the en banc Ninth Circuit categorically rejected it by expressly "disavow[ing]" a "long line of [circuit] authority," App. 20a, 45a, which recognized that the terms of a CBA include "working condition[s] whether or not [they are] specifically discussed in the CBA," *Laws*, 852 F.2d at 433, and that claims based on such working conditions "necessarily involve contract interpretation." *Schlacter-Jones*, 936 F.2d at 441.

In this respect, the Ninth Circuit's decision conflicts not only with the Seventh Circuit's decision in *Amoco*, but also with that court's decision in *Douglas* v. *American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989). There, the court held that § 301 preempted an emotional distress claim based on an employer's alleged retaliation against an employee because its resolution required the court to determine "whether [the] employer's conduct was authorized by the explicit or implicit terms of the [CBA]." *Id.* at 573. As the court recognized, "the fact that a particular provision of the [CBA] may not explicitly address the

conduct underlying [the] complaint does not mean that resolution of [a] claim does not require interpretation of the agreement." *Id.* at 572. "[T]he parties' contractual obligations regarding the terms and conditions of the employment relationship need not be reduced to the words 'expressly recited in the agreement.' " *Id.* (quoting *Allis-Chalmers*, 471 U.S. at 214).

The Ninth Circuit's en banc decision also conflicts with the Fourth Circuit's en banc decision in *McCormick* v. *AT&T Technologies, Inc.*, 934 F.2d 531 (4th Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992). There, the court held that § 301 preempted an emotional distress claim based on an employer's removal of contents from an employee's locker because "[w]hether the actions of management personnel * * * were in any way wrongful simply [could not] be determined without examining the [CBA] to ascertain the extent of any duty [the employer] may have owed [the employee]." *Id.* at 536. Even though "management's rights and responsibilities regarding employee lockers [were] not *explicitly* delineated in the agreement," the court held, "[t]he specifics as to management conduct * * * need not be spelled out in all their detail and refinement for the [CBA] to be applicable." *Id.* (emphasis added).

Similarly, the decision below conflicts with the Tenth Circuit's decision in *Johnson* v. *Beatrice Foods Co.*, 921 F.2d 1015, 1020 (10th Cir. 1990), in which the court held that an emotional distress claim based on the manner in which an employee's discipline was carried out involved a "work-related dispute," and therefore "directly relate[d] to either explicit or implied rights derived from the CBA, just as the bad-faith tort claim in *Allis-Chalmers* did."

The conflict between the decision below and this line of decisions further underscores the need for review.

II. THE EN BANC NINTH CIRCUIT'S ALTERNATIVE HOLDING ALSO CONFLICTS WITH DECISIONS OF THIS COURT AND THOSE OF OTHER FEDERAL CIRCUITS.

The Ninth Circuit below held in the alternative that even if the CBA expressly authorized the use of two-way mirrors, § 301 would still not preempt respondents' claims because the installation of two-way mirrors is prohibited by § 653n of the California Penal Code. App. 18a-21a. In the majority's view, "freedom from the illegality [of two-way mirror surveillance] is a 'nonnegotiable state-law right[],' " and "[b]y definition, therefore, [respondents] were reasonable in expecting to be free of [such surveillance]." App. 19a (quoting *Allis-Chalmers*, 471 U.S. at 213). Thus, the majority concluded, "a court reviewing [respondents'] claims * * * need not interpret the CBA to arrive at its conclusion." *Id.* That holding not only is deeply flawed, but fails to square with decisions of this Court and those of other federal circuits.

1. a. In *Allis-Chalmers*, this Court drew a distinction between state law claims that confer "nonnegotiable state-law rights" that are "*independent* of any right established by contract" (which are not preempted by § 301), and those that are "inextricably intertwined with consideration of the terms of the labor contract" (which are preempted by § 301). 471 U.S. at 213 (emphasis added). In *Lingle*, this Court further emphasized that to escape preemption a state law claim not only must confer nonnegotiable rights, but must be sufficiently independent of the CBA as well. As the Court explained, "[w]hile it may be true that most state laws that are not preempted by § 301 will grant nonnegotiable rights," that "condition" alone does not "ensure[] nonpre-emption." 486 U.S. at 408 n.7. "It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application." *Id.*

b. This case involves precisely such a situation. Even assuming that § 653n confers a "nonnegotiable state-law right"—a highly questionable proposition at best[15]—respondents' claims nevertheless "turn[] on the interpretation of [the] collective-bargaining agreement." *Id.* The civil remedy for a violation of § 653n—which does not create a private right of action—is an invasion of privacy claim. Proof of such a claim requires " 'a reasonable expectation of privacy on the plaintiff's part.' " App. 30a n.6 (quoting *Hill*, 865 P.2d at 655). Whether a person has a reasonable expectation of privacy "turns on whether he consented to the intrusion." App. 33a. Thus, even if § 653n confers a "nonnegotiable state-law right" to be free from two-way mirror surveillance, the fact that a person may have consented to such surveillance nevertheless " 'affects [his] expectations.' " *Id.* (quoting *Hill*, 865 P.2d at 655).[16]

Here, determining whether respondents, through their union, consented to the challenged surveillance "depends upon the meaning" of the CBA. *Lingle*, 486 U.S. at 406. Accordingly, respondents' claims are not "independent" of the

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[15] It cannot be the case that § 653n prohibits the observation of oneself, or of others with their consent. That would stand the whole concept of privacy on its head. Not surprisingly, then, the California authorities have not taken that approach. As the dissent below explained, the California Supreme Court apparently views the statute as prohibiting only " 'clandestine, *unexpected*' viewing." App. 31a n.7 (quoting *In re Deborah C.*, 635 P.2d at 452) (emphasis in dissent). *See supra* at 11 n.8. The Riverside County District Attorney also apparently took this view, declining to press charges because "the conduct involved was not motivated by an intent that would warrant criminal prosecution." App. 32a n.7.

[16] The majority's contrary conclusion—that a person consenting to such surveillance nevertheless has a reasonable expectation of privacy as a matter of law—is clearly erroneous. Indeed, as the dissent below pointed out, that conclusion "lead[s] to the ridiculous situation in which I could *invite* someone to videotape me behind a two-way mirror, only to then turn around and sue that person for violating my right to 'privacy.' " App. 32a.

CBA. In holding that § 301 does not preempt respondents' claims merely because—in its view—§ 653n confers a "nonnegotiable state-law right," the majority plainly contravened this Court's precedents.[17]

2. The majority's alternative holding is also directly at odds with the decisions of other federal circuits uniformly holding that § 301 preempts workplace privacy claims. As the Seventh Circuit noted in *Amoco*, "state-law invasion-of-privacy claims depend on proof that the defendant invaded an objectively reasonable expectation of privacy." 964 F.2d at 710. "What expectations of privacy in the workplace are objectively reasonable depends on powers and duties specified in the collective bargaining agreement." *Id.* Consequently, every court of appeals to consider the issue has held that "a claim of invasion of privacy in the workplace necessarily rests on federal labor law." *Id. See, e.g.*, *Mock*, 971 F.2d at 530; *Jackson*, 863 F.2d at 119; *Kirby*, 811 F.2d at 256; *Strachan*, 768 F.2d at 705.

The majority's holding plainly conflicts with these decisions recognizing that workplace privacy claims turn on employee expectations of privacy, and that those expectations are based on the terms of the CBA. The fact that this case involves a criminal statute does not make a difference. As discussed above, respondents' claims require " 'a reasonable expectation of privacy on [their] part.' " App. 30a n.6 (quoting *Hill*, 865 P.2d at 655). Even if the challenged surveillance violated the statute, whether respondents consented to the surveillance " 'obviously affect[ed] [their] expectations' " of privacy. App. 33a (quoting *Hill*, 865 P.2d at 655). And whether they consented "depends on the

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[17] Preemption would not render the "nonnegotiability" of the rights conferred by § 653n a nullity. If indeed such rights are nonnegotiable, then a person's consent to conduct prohibited by § 653n would not bar prosecution under § 653n.

powers and duties specified in the [CBA]." *Amoco*, 964 F.2d at 710.

Moreover, even if this case were somehow distinguishable, the majority's alternative holding would still conflict with decisions holding that claims based on conduct that might have been criminal were nevertheless preempted by § 301. In *Mock* v. *T.G. & Y. Stores Co.*, *supra*, for instance, the Tenth Circuit held that § 301 preempted a claim for false imprisonment under Oklahoma law—even though false imprisonment can be a crime in Oklahoma, *see* Okla. Stat. tit. 21, § 741—concluding that the claim required "an analysis of what the CBA permitted." 971 F.2d at 530. *See also Romero* v. *Hilton Hotels Corp.*, 1991 WL 340574, at *3 (D. Haw. 1991) (claims for assault, battery, and false imprisonment preempted by § 301). Accordingly, far from obviating the necessity of this Court's intervention, the majority's reliance on § 653n only heightens the need for review in this case.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

Although the multiple conflicts engendered by the Ninth Circuit's en banc decision themselves merit review, certiorari is particularly warranted in this case in view of the importance of the question presented. The § 301 preemption doctrine serves vital federal policies. First, as discussed above, the doctrine ensures uniform interpretation of CBAs. Such uniformity is necessary to avoid "[t]he possibility that individual contract terms might have different meanings under state and federal law[, which] would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lucas Flour*, 369 U.S. at 103. If parties to a CBA cannot "be certain of the rights which [they have] obtained or conceded, the process of negotiating an agreement [will] be made immeasurably more difficult." *Id.* Moreover, "the possibility of conflicting

substantive interpretation under competing legal systems would tend to stimulate and prolong disputes." *Id.* at 104.

Second, the doctrine "preserves the central role of arbitration" in labor disputes. *Allis-Chalmers*, 471 U.S. at 219. As this Court has noted, "[a]rbitrators are delegated by nearly all collective-bargaining agreements as the adjudicators of contract disputes," *Lingle*, 486 U.S. at 411 n.11, and "Congress has expressly approved contract grievance procedures as a preferred method of settling disputes and stabilizing the 'common law' of the plant." *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 (1965).[18] By remanding to state court claims that should be resolved through arbitration "by reference to uniform federal law," *Allis-Chalmers*, 471 U.S. at 211, the decision below undermines these important federal policies.

The decision below also threatens to undermine the "smooth functioning" of the collective bargaining process in another respect. *Lucas Flour*, 369 U.S. at 104. CBAs commonly deal with privacy—either protecting it or waiving it in varying degrees—in an attempt to balance workers' privacy rights against an employer's need to address problems such as drug abuse. In fact, more than three-fifths of the CBAs analyzed by one commentator contained one or

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[18] Arbitrators routinely deal with privacy issues. *See, e.g., Rush-Presbyterian-St. Luke's Med. Ctr.* v. *Local 743, IBT*, 1993 WL 788061 (1993) (surveillance was not an infringement of employee's right to privacy and could be undertaken unilaterally by management); *United States Steel Corp.* v. *United Steelworkers, Local 1253*, 49 Lab. Arb. Rep. (BNA) 101 (1967) (surveillance of individual employees was a legitimate means used by management to determine the source of a problem); *FMC Corp.* v. *United Auto., Aerospace & Agric. Implement Workers of Am., Local 724*, 46 Lab. Arb. Rep. (BNA) 335 (1966) (television surveillance of employees not an infringement upon their basic rights of privacy because employees' actions at work were not private); *see also Casting Eng'rs* v. *United Elec., Radio, & Machine Workers of Am., Local 1114*, 76 Lab. Arb. Rep. (BNA) 939 (1981); *Chrysler Corp.* v. *International Union*, 53 Lab. Arb. Rep. (BNA) 1279 (1969).

more specific references to privacy, including provisions dealing with workplace surveillance.[19] The en banc Ninth Circuit's decision, however, generates uncertainty as to an employer's potential exposure to litigation for enforcing privacy provisions of a CBA—like the one in this case—that covers employees in different states because the States treat the subject of privacy in such diverse fashions.

Connecticut and Minnesota, for example, have criminal prohibitions against surreptitious surveillance with no mention of consent,[20] whereas States like Wisconsin and Tennessee have the same prohibition but make a specific exception where there is consent.[21] Some States, such as Texas, enforce a common law right to privacy but treat consent as an absolute defense.[22] A few States, like New York and North Dakota, do not recognize privacy claims at all, either by common law or by statute.

Alabama allows videotaping in public places;[23] in Alaska surreptitious videotaping is legal if done in the interest of crime prevention or prosecution and notice is posted;[24] in Louisiana image recording is forbidden only if done for a

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[19] *See* L. E. Lundey, *Privacy Provisions in Major Collective Bargaining Agreements*, BLS Bulletin 2448, at 3 (1992). *See also* A. Thomson, *Union FAQ's*, 38 Occupational Outlook Quarterly 16, 16 (Winter 1994-95) ("Besides the standard bread and butter issues of wages, benefits, and working conditions, many collective bargaining agreements now include * * * privacy provisions").

[20] Conn. Gen. Stat. §§ 31-48b, 53-41a; Minn. Stat. § 609.746.

[21] Wis. Stat. Ann. § 942.08; Tenn. Code Ann. § 39-13-605.

[22] *See Billings* v. *Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973); *Farrington* v. *Sysco Food Servs., Inc.*, 865 S.W.2d 247, 253 (Tex. App. 1993).

[23] *I.C.U. Investigations, Inc.* v. *Jones*, 780 So.2d 685, 689-690 (Ala. 2000).

[24] Alaska Stat. § 11.61.123 (c), (d).

"lewd or lascivious purpose";[25] in Georgia surreptitious surveillance is illegal but can be waived directly or indirectly, and pertinent privacy rights can be outweighed by safety considerations;[26] in at least one State, New Mexico, there are no statutes or cases prohibiting surreptitious surveillance except in the context of stalking;[27] in Hawaii the right to privacy may be lost through a clear course of conduct;[28] in Michigan fitting rooms can be surveilled if signs are posted notifying customers;[29] in Missouri consent is a defense to surreptitious taping;[30] and in Pennsylvania a mere belief that a defendant has consented may defeat an action for intrusion into seclusion.[31]

Under the Ninth Circuit's decision, workplace privacy claims brought in some of these States may be referred to arbitration, whereas in others they may be subject to litigation. This lack of certainty frustrates the collective bargaining process. As Judge Tallman noted in his concurrence below, the Ninth Circuit's decision "threatens the ability of * * * parties to negotiate legitimate expectations of privacy," and "threatens multi-state employers' ability to fulfill federally mandated safety requirements by negotiating with their

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[25] La. Rev. Stat. 14:283(A)(1).

[26] Ga. Code Ann. § 16-11-62(2); *Ellenberg* v. *Pinkerton's, Inc.*, 188 S.E.2d 911, 914 (Ga. Ct. App. 1972); *Elmore* v. *Atlantic Zayre, Inc.*, 341 S.E.2d 905, 907 (Ga. Ct. App. 1986).

[27] N.M. Stat. Ann. § 30-3A-3.

[28] *Black* v. *City & County of Honolulu*, 112 F. Supp. 2d 1041, 1053 (D. Haw. 2000) ("the right to privacy may be waived * * * if the complaining party displays a clear, unequivocal, and decisive act of waiver").

[29] *Lewis* v. *Dayton Hudson Corp.*, 339 N.W. 2d 857, 860 (Mich. Ct. App. 1983).

[30] Mo. Ann. Stat. § 565.253.

[31] *O'Donnell* v. *United States*, 891 F.2d 1079, 1083 (3d Cir. 1989).

employees." App 23-24a. That would include the ability of a multi-state employer—like Consolidated—to negotiate limits on legitimate expectations of privacy in order to detect and deter drug use.

Finally, as the various state privacy laws—not to mention the numerous cases discussed in this petition—suggest, the question presented will continue to recur. Resolution of the conflicts presented in this case will go a long way towards ensuring consistent results in countless future cases. As this Court has recognized, the courts of appeals are very much in need of guidance. *See, e.g., Livadas*, 512 U.S. at 124 n.18 ("the Courts of Appeals have not been entirely uniform in their understanding and application of the principles set down in *Lingle* and [*Allis-Chalmers*]"). This Court should grant certiorari to ensure that federal law remains "paramount" in this important area of labor law. *Lucas Flour*, 369 U.S. at 103.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-55657, 98-56041 and 98-56154

LLOYD W. CRAMER; DANIEL E. LIPICH,
Plaintiffs-Appellants,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Defendant-Appellee.

GUILLERMO ALFARO,
Plaintiff,

and

DENNIS R. BLEVINS; RAY R. CASIO; STEVE CUNNINGHAM; RICK DEWOODY; ALEJANDRO GARCIA; DAVID V. GARCIA; RAUL C. GARCIA; JAMES A. GRECO; BRUCE A. HARVEY; JOHN K. HATFIELD; ROBERT W. HATFIELD; LEE A. INGRAM; ZENO KING, JR., JOHN L. LACROIX; GREGORY A. LANDAVAZO; MELVIN LEO LEWIS; ENRIQUE LOPEZ; HERBERT MARCUS; IGNACIO V. OCHOA; BRIAN K. PAGNE; MANUEL PARRA; JAMES A. PROITTE; CARLOS RIVERA; HAROLD JAMES TAYLOR, JR.; THOMAS A. SCOTT; DAVID W. STEPHENS; J.B. STEWART; ALFONSO WAGNER; LARRY A. WELLS; ROBERT P. WILLIAMS; ERIC J. WRIGHT; WILLIAM A. YESFORD; MIGUEL ABARAJAS; SANDRA RAY

AMBROSE; GUILLERMO AMESOLA; ABELARDO APUAN; MICHAEL VINCENT ARBANAS; CARLOS ARGANDORA; JOSE ABRIERO; MARCARIO ACELLANO; FERNANDO AVILA; MICHAEL E. BANNAN; ARNOLD A. BARAJAS; ROBERT BARRAS; MIKE BARTLEY; DAVID BARTON; JAN K. BEBER; WILLIAM OTIS BEGGS; CRAIG ANTHONY BERLENE; PAUL EUGENE BOATWRIGHT; BRIGIDO BOLIVAR; RAYMOND BONIA; RICHARD BOON; ROGER J. BRASS; GARY BROOKS; MICHAEL D. BROWN; JOANNE BRUMMER; SCOTT BUBIER; EDUARDO S. CARDENAS; MANUEL CARDONA; MARIO CARILLO; HARRIS A. CARTER; RICHARD CENICEROS; JACK CLARK; KENNETH L. CLARK; FERNANDO A. CLAVIJO; ROBERT L. CLINTON, RICHARD CONTRERAS; RANCE D. COOPER; ANTHONY CORDERO; ARMANDO CORDERO; JOHN L. CORDERO; RUDY H. COUTHART; CHARLES DAVIDSON, II; THOMAS DERSGHY; PHILIP DiGENOVA; CHARLES DIRNER; JIMMY DIXON; AL DORAME; EDDIE SHEPHERD; CLIFFORD J. FELTON; MIKE FITZGERALD; JOSE LUIS FLORES; RAFAEL O. FLORES; ED FOOR; JERRY FRANCE; ALBERT ALEX FRANCO; RAMON B. FRANCO; MICHAEL GAMBINO; ANTHONY GAPDORA; ROBER T. GARCIA; DONALD K. GLOVER; DAVID P. GOMEZ; MANUEL E. GONZALES; GERALD W. GOODWIN; DEVIN JONATHAN GORDON; JONATHAN J. GORDON; JERRY GOFORTH; BERNAL GREGETZ; JOSE GUTIERREZ; JESSE D. HALEY; JAMES HARPER, JR.; SANDRA HEATLEY; PATRICK L. HERON, JR.; RANDALL WILLIAM HOBBS; NARVELL E. HOOKS; STEVE HOPKINS; TIM HOSEA; GAYLE LYNN HAMPTON; JAMES HURLBURT; JOHN W. JACKSON; JAMES ROBINSON; WILLIAM JARRELL; ALFREDO JIMENEZ; GARY E. JOHNSON; PETER KARABAN; ROBERT M. KIRKLAND; LARRY RISSEL; CARY KNIGHT; ANNE M. KNUTZEN; PATRICK J. KNUTZEN; ERVIN KROLL; FRANK P. LAGUMINA; HERCLIO LEMUS; ELORIA REYES; RICHARD E. LUCERO; ENRIQUE MANCILLA; CLIFFORD E. MAPLES; GUILLERMO MARTIN; REGUIO MARTIN; GILBERT M. MARTINEZ; RONALD A. MATTHEWS;

DAVID E. MAY; MICHAEL J. MCCARTHY; DON R. MCCLARY; WILLIAM R. MCFARLAND; SAUL A. MCKECHAN; P.L. MEDINA; PEDRO A. MONGE; ALFRED MONTOYA; ARTHUR MORA; MARCOS MORALES; ROY L. MCFOOT; DEWAYNE MORTENSEN, II; MARK MULHERN; OSCAR MUNOZ; JOHN MURRAY; RAYNO NORDUCCI; HECTOR OCHOA; JORGE OCHOA; MICHAEL O'NEAL; LUIS E. ORTEGA; GILBERT GEORGE ORTIZ; VICTOR PARKER; DAVID PERALES; ISIDRO PERALES; ROBERT PORTILLO; ROBIN J. QUIGLEY; JOSEPH R. QUILTY, II; ROBERT REYNOSO; BRYAN RICHARD; CARLOS OROZCO RIVAS; GILBERT C. RIVERA; HOWARD ROBINSON; AUDIAS RODRIGUEZ; HUGO RODRIGUEZ; RUBEN RODRIGUEZ; TOMAS A. RODRIGUEZ; JOHN ROJAS; JAVIER ROMAN; ARMANDO ROMERO; ROBERT A. ROSAS; EUGENE A. ROSE; FRANCISCO J. RUIZ; C.W. RYAN; CATHERINE SCHATZ; DENNIS SCHATZ; STEVEN SCHILLING; NORMAN W. SCHOOLCRAFT; ERNIE SCOLARI; JOHN P. SOROUSE; JOSEPH SELCHO; JAMES SHINN; NATHAN SHROPSHIRE; RICHARD F. SHUMWAY; DAVID MANUAL SIERRAS; DAVID H. SMITH, JR.; ROBERT P. SMITH; CLARENCE SATTERLAND; JAMES BOBBY L. STONE; ALEJANDRO TIRADO; FABRIZIO TORRES; BRIAN UNZICKER; FRANK VALDEZ; MARIO A. VASQUEZ, JR.; MARIO A. VASQUEZ, SR.; RICHARD J. VARGAS; ALEXANDER VILLA, JR.; GUADALUPE REYES WAGGONER; WAYMOND A. WALKER; ROBERT WELSH; WILLIAM M. WESTON, JR.; ROBERT FRITZ WESTREICHER; JUDY LEN WILSON; GARY WAYNE YATES; DENNA JEAN YASANIA; DONALD RAY YODER; LYLE ARCHIBALD; EWALD BARTH; LEROTY O. BELL; HENRY CAMACHO; NICK J. CARENDER; K.W. CARRITHERS; JOSE CASILLAS; ARMANDO CORONADO; RICHARD COTA; DONALD K. CRONK; RICHARD JOSEPH DIAZ; JACK E. DOBSON; FRANCISCO ESPARZA; JOSE C. FLORES; ERNEST W. FRICK; RUDY GOMEZ; JOSEPH GONZALES; MICHAEL GROOM; JOAQUIN HERNANDEZ; JOHN ALFRED HILL; TERRY L. JOHNSON; OSCAR H. MARTIN; ELY

McDONAGLE; FULTON L. MITCHELL; GRADY RICHARD NUTT; GILBERT ORTIZ, JR.; MICHAEL T. PAUCH; JEFFREY M. PHILLIPS; MICHAEL R. PRESTON; BILLY C. RATLEDGE; ALFRED G. RODRIGUEZ; GILBERT ROSALES; OLIVER SONJY; JOHN STURGES; DONALD F. WOODS; F. THOMAS THORNE; RONALD M. AUBERT; HARVEY GEORGE BEACH; PAUL EDWARD BECKER; HAROLD BURNLEY; KIM HARSHA; JOSEPH CHAVEZ; PAUL E. COX; JOSEPH DeFRANCIS; BILL JOE McFARLAND; WILLIAM E. MULDOON; JOSE A. UDELL PETERSON; ANDREW SLAUGHTER; AMOS TAYLOR; JIM H. WILLOUGHBY; RICHARD ALVARADO; HENRY H. ANDRADE; GARY A. RAMIREZ; ARMAND S. RAMIREZ; MASAO SHOBE; NOBLE A. CARSON; ERIC G. FROMM; LUE G. GARY; RICHARD ANTHONY LEON; JAMES R. O' NEILL; JERRY STROTHER; TODD T. STEVENS,

Plaintiffs-Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION, A DELAWARE CORPORATION; CNF TRANSPORTATION, INC., A DELAWARE CORPORATION, AKA CONSOLIDATED FREIGHTWAYS, INC.; MARK EPSTEIN, AN INDIVIDUAL; DOUGLAS SCHUSTER, AN INDIVIDUAL; DOE SECURITY INSTALLATION COMPANY,

Defendants-Appellees.

CHARLES R. DAVIDSON, H; GUILLERMO ALFARO; DAVID FITZHUGH; STEVEN B. BUGARIAN; IGNACIO LAWTON; DREW WHEAT; DONALD STUBBLEFIELD,

Plaintiffs,

and

THERESA HOFFMAN; MASAO SHOBE,

Plaintiffs-Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION, A DELAWARE CORPORATION, AKA CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; CNF TRANSPORTATION, INC., A DELAWARE CORPORATION, AKA CONSOLIDATED FREIGHTWAYS; MARK EPSTEIN, AN INDIVIDUAL; DOUGLAS SCHUSTER, AN INDIVIDUAL,

Defendants-Appellees.

Nos. 98-55657, 98-56041 and 98-56154

Argued and Submitted En Banc Dec. 18, 2000
Filed June 15, 2001

Appeals from the United States District Court for the Central District of California Irving Hill, District Judge, Presiding.* D.C. Nos. CV-97-07860-IH, CV-98-00332-LHM (ANx)

Before: SCHROEDER, Chief Judge, PREGERSON, REINHARDT, O'SCANNLAIN, TASHIMA, THOMAS, McKEOWN, FISHER, GOULD, PAEZ and TALLMAN, Circuit Judges.

FISHER, Circuit Judge:

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* These actions were initially assigned to Hon. Irving Hill, who entered judgment in *Cramer* v. *Consolidated Freightways, Inc.*, CV 97-7860-IH, No. 98-55657. *Alfaro* v. *Consolidated Freightways Corp.*, SA CV 98-331, No. 98-56041, and *Davidson* v. *Consolidated Freightways Corp. (Hoffman)*, SA CV 98-332-LMG, No. 98-56154, were subsequently reassigned to Hon. Linda H. McLaughlin.

This appeal requires us to decide whether a plaintiff's state law privacy claim, based on California's penal code, is preempted under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Resolution of this issue, in turn, leads us to clarify our Circuit's approach to § 301 preemption. We hold that because plaintiffs' privacy claims are not even arguably covered by the collective bargaining agreement ("CBA"), the claims are independent of the CBA and thus are not subject to § 301 preemption. Moreover, we hold that when an employer's surreptitious surveillance constitutes a per se violation of established state privacy laws, the employees affected thereby may bring an action for invasion of privacy regardless of the terms of the collective bargaining agreement governing their employment.

I.

Consolidated Freightways ("Consolidated"), the defendant in this action, is a large trucking company.[1] It concealed video cameras and audio listening devices behind two-way mirrors in the restrooms at its terminal in Mira Loma, California, ostensibly to detect and prevent drug use by its drivers. Employees at the terminal discovered the surveillance equipment when a mirror fell off the men's restroom wall, exposing a camera with a wire leading out through a hole in the wall behind it. Subsequent investigation revealed a similar hole in the wall behind the mirror in the adjoining women's restroom.

Under California Penal Code § 653n, "[a]ny person who installs or who maintains * * * any two-way mirror permitting observation of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or

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[1] This case is a consolidation of two separate appeals. In one, Consolidated Freightways, Inc. was the only defendant. The other named Consolidated Freightways Corp., CNF Transportation, Inc. (aka Consolidated Freightways, Inc.), two individuals and a Doe security installation company as defendants. For ease of reference, this opinion refers to the defendants collectively as "Consolidated."

hotel room, is guilty of a misdemeanor." Thus, Consolidated's installation of the two-way mirror was a direct violation of California criminal law.

Soon after discovery of the camera, truck driver Lloyd Cramer, an employee at the Mira Loma terminal, brought a class action suit in state court alleging invasion of privacy on behalf of all "individuals lawfully on the premises * * * who had a reasonable expectation of privacy while using [Consolidated's] restrooms." Guillermo Alfaro, another Consolidated employee, and 281 others brought a separate suit seeking damages for invasion of privacy and infliction of emotional distress. They also sought injunctive relief to end the use of the surveillance devices.

Consolidated removed both cases to federal court, contending that plaintiffs' state claims were preempted under § 301 of the LMRA because the claims required interpretation of the CBA between Consolidated and its employees' union to determine the employees' reasonable expectations of privacy. The cases were consolidated in the district court (as they have been for purposes of appeal).

Consolidated then moved to dismiss both cases, arguing that they were preempted by § 301. Cramer moved for class certification, and Alfaro, joined by Cramer, filed a motion to remand for lack of jurisdiction. The district court denied Alfaro and Cramer's motion to remand, granted Consolidated's motion to dismiss Cramer's suit, granted Consolidated's motion to dismiss Alfaro's suit as to all but nine plaintiffs who were not Consolidated employees, remanded the claims of the nine nonemployees to state court and denied Cramer's certification motion as moot. This appeal followed.

We have jurisdiction under 28 U.S.C. § 1291. We review a district court's finding of preemption under § 301 de novo. *Audette* v. *ILWU*, 195 F.3d 1107, 1111 (9th Cir. 1999). We reverse.

II.

The history of § 301 preemption doctrine is well known, but worth summarizing again to explain how we have arrived at the current state of the law and to provide context for our discussion. As this court has noted, "[f]amiliarity [with the subject matter] has not bred facility." *Galvez* v. *Kuhn*, 933 F.2d 773, 774 (9th Cir. 1991).

Section 301 is on its face a jurisdictional statute, under which "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). Soon after passage of the LMRA, the Supreme Court ruled that § 301 authorized the federal courts to develop a federal common law of CBA interpretation. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 451 (1957). The Court subsequently held that this federal common law preempts the use of state contract law in CBA interpretation and enforcement. *Local 174, Teamsters of Am.* v. *Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

In *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), the Court expanded application of § 301 preemption beyond cases specifically alleging contract violation to those whose resolution "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.* at 220. *Allis-Chalmers* involved an employee's suit alleging his employer had handled his claim for disability benefits in bad faith, thereby violating state tort law. *Id.* at 206. Because the method of handling disability claims was specified in the CBA governing Lueck's employment, the Court interpreted his claim as essentially a recharacterized action for breach of the CBA, and held that it was preempted under § 301. *Id.* at 215 ("[I]t is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments

in a timely manner, and, if so, whether Allis-Chalmers' conduct breached that implied contract provision.").

The Court reiterated its test for preemption in *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386 (1987). Although acknowledging that "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization," the Court explained that § 301 preempts only "claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " *Id.* at 394 (quoting *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (internal quotation marks omitted); *Elec. Workers* v. *Hechler*, 481 U.S. 851 (1987)). The Court made clear that the complaints of employees covered by a CBA were not preempted if their claims were unrelated to the terms of the CBA, specifically rejecting the employer's contention that "all employment-related matters involving unionized employees be resolved through collective bargaining and thus be governed by a federal common law created by § 301." *Id.* at 396 n.10 (internal quotation marks omitted). Moreover, the Court held that a defense based on the terms of a CBA is not enough to require preemption: "[A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Id.* at 399.

Attempting to clarify when claims are preempted under § 301, *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), held that states may provide substantive rights to workers that apply without regard to a CBA; a state court suit seeking to vindicate these rights is preempted only if it "requires the interpretation of a collective-bargaining agreement." *Id.* at 413. In *Lingle*, the plaintiff's union had filed a grievance alleging discharge without just cause against her employer pursuant to a CBA at the same time the plaintiff had filed a suit in state court for retaliatory

discharge. The Court held that the plaintiff's suit was not preempted: "[E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Id.* at 409-10. The Court took pains to note that even if the CBA refers to the state law substantive right at issue, the claim is not preempted so long as it may be litigated without reference to the CBA. "[T]he mere fact that a broad contractual protection against discriminatory—or retaliatory—discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract." *Id.* at 412-13.

Finally, *Livadas* v. *Bradshaw,* 512 U.S. 107 (1994), summarized and advanced the state of preemption doctrine. *Livadas* explained:

> [T]he pre-emption rule has been applied only to assure that the purposes animating § 301 will be frustrated neither by state laws purporting to determine "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement," nor by parties' efforts to renege on their arbitration promises by "relabeling" as tort suits actions simply alleging breaches of duties assumed in collective-bargaining agreements.
>
> In *[Allis-Chalmers]* and in *Lingle* * * * we underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and we stressed that it is the legal character of a claim, as "independent" of rights under the collective-bargaining agreement (and not whether a grievance arising from "precisely the same set of facts" could be pursued) that decides whether a state cause of action may go forward. Finally, we were clear that when

> the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.

Id. at 122-24 (internal citations and footnotes omitted).

Based on these principles, *Livadas* held that because the plaintiff's claim required the court only to "look to" the CBA to determine her rate of pay, there was not even a "colorable argument" for preemption, because her claim was "entirely independent of any understanding embodied in the collective-bargaining agreement between the union and the employer." *Id.* at 124-25. Even though the Court looked to the CBA to determine the *absence* of a waiver of state law protections, it concluded that preemption was not required. *See id.* at 125.

The demarcation between preempted claims and those that survive § 301's reach is not, however, a line that lends itself to analytical precision. As the Supreme Court acknowledged in *Livadas*, "[T]he Courts of Appeals have not been entirely uniform in their understanding and application of the principles set down in *Lingle* and [*Allis-Chalmers*]." *Id.* at 124 n.18. And little wonder. "Substantial dependence" on a CBA is an inexact concept, turning on the specific facts of each case, and the distinction between "looking to" a CBA and "interpreting" it is not always clear or amenable to a bright-line test. *See Balcorta* v. *Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108-09 (9th Cir. 2000); *Ramirez* v. *Fox Television Station, Inc.*, 998 F.2d 743, 748 (9th Cir. 1993). Nevertheless, the interpretive principles the Supreme Court has articulated help guide us through the analytical thicket.

If the plaintiff's claim cannot be resolved without interpreting the applicable CBA—as, for example, in *Allis-Chalmers*, where the suit involved an employer's alleged failure to comport with its contractually established duties—

it is preempted. *See also Hechler,* 481 U.S. at 861-62.[2] Alternatively, if the claim may be litigated without reference to the rights and duties established in a CBA—as, for example, in *Lingle,* where the plaintiff was able to litigate her retaliation suit under state law without reference to the CBA—it is not preempted. *See also Livadas,* 512 U.S. at 124-25. The plaintiff's claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim. If the claim is plainly based on state law, § 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense. *See Caterpillar,* 482 U.S. at 398-99.

Moreover, alleging a hypothetical connection between the claim and the terms of the CBA is not enough to preempt the claim: adjudication of the claim must require interpretation of a provision of the CBA. A creative linkage between the subject matter of the claim and the wording of a CBA provision is insufficient; rather, the proffered interpretation argument must reach a reasonable level of credibility.[3] *Cf.*

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[2] We note that the Supreme Court recognized in *Livadas* that where the claim cannot be resolved without interpreting the CBA, "[h]olding the plaintiff's cause of action substantively extinguished may not *** always be the only means of vindicating the arbitrator's primacy as the bargained-for contract interpreter." *Livadas,* 512 U.S. at 124 n.18 (citing *Collyer Insulated Wire, Gulf, & W. Sys. Co.*, 192 N.L.R.B. 837 (1971) (establishing the practice of holding in abeyance NLRB unfair labor practice cases involving interpretation of the CBAs where there is an applicable arbitration clause and requiring that the parties arbitrate any such interpretation question and then return to the Board for adjudication of any remaining legal and factual issues within the Board's jurisdiction)). Because we find that here there is no need to interpret the CBA to resolve the plaintiffs' claims, we do not address under what circumstances a practice of deferring the litigation pending an arbitrator's resolution of the contract interpretation issues rather than extinguishing the claim might be appropriate.

[3] The dissent's attempt to extract from the CBA's silence on the use of video cameras an implied consent to illegal videotaping from behind two-way mirrors is an example of "creative linkage" that strains credulity. *See* note 6, *infra.*

Livadas, 512 U.S. at 124-25. The argument does not become credible simply because the court may have to consult the CBA to evaluate it; "look[ing] to" the CBA merely to discern that none of its terms is reasonably in dispute does not require preemption. *Id.* at 125.

Where a party defends a state cause of action on the ground that the plaintiff's union has bargained away the state law right at issue, the CBA must include "clear and unmistakable" language waiving the covered employees' state right "for a court even to consider whether it could be given effect." *Livadas*, 512 U.S. at 125 (citing *Lingle*, 486 U.S. at 409-10 n.9). Thus, a court may look to the CBA to determine whether it contains a clear and unmistakable waiver of state law rights without triggering § 301 preemption.

Given this analytical framework, we conclude that several of our Circuit's opinions—all of which were decided before *Livadas*—state preemption principles that need to be clarified and corrected. In *Utility Workers of America, Local No. 246* v. *Southern California Edison Co.*, 852 F.2d 1083 (9th Cir. 1988), we held a union's allegation that an employer's unilaterally instituted drug testing policy violated the California Constitution was preempted because resolution of the claim was substantially dependent on analysis of the applicable CBA; but we went on to suggest that the claim was preempted because it "constitute[d] a properly negotiable subject for purposes of collective bargaining."[4] *Id.* at 1086. Similarly, in *Laws* v. *Calmat*, 852 F.2d 430 (9th Cir. 1988), we upheld dismissal on § 301 preemption grounds of an employee's suit challenging his employer's drug and alcohol testing program and his subsequent suspension for failing to participate. We held the testing to be "a working condition whether or not it is specifically

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[4] The complaint also alleged that the employer had violated the CBA, but the privacy claim was based solely on the California Constitution. *Utility Workers*, 852 F.2d at 1085.

discussed in the CBA," and noted that "[a]lthough the manner of discovering employee intoxication is not in the current CBA, the reference to 'intoxication' seems to identify this arena as a subject for the collective bargaining process." *Id.* at 433; *see also Schlacter-Jones* v. *General Tel.*, 936 F.2d 435, 441 (9th Cir. 1991) (characterizing plaintiff's claim in part as one that "cannot be assessed without examining the CBA to determine whether the Drug Policy was a valid term and condition of employment"); *Stikes* v. *Chevron USA, Inc.*, 914 F.2d 1265, 1268, 1270 (9th Cir. 1990) (relying in part on *Utility Workers* and *Laws* to find privacy claim preempted; stating that "even if the California courts were to find the privacy right non-waiveable, the right is not absolute and its scope would involve consideration and possible interpretation of the collective bargaining agreement."). Taken together, these cases suggest that the preemptive force of § 301 is so strong that preemption must occur simply because the state right in question "is a properly negotiable subject for purposes of collective bargaining." *Utility Workers*, 852 F.2d at 1086.

In light of the principles we have reviewed, however, it is clear that this formulation of the standard would expand the scope of § 301 preemption far beyond the limits established in *Lingle* and *Livadas*, both of which caution against such a sweeping interpretation. *See Livadas*, 512 U.S. at 122-24 (rejecting the argument that enforcement of a generally applicable state law in cases involving union employees would improperly intrude on the collective bargaining process); *Lingle*, 486 U.S. at 409-10 (holding that the Illinois law protecting employees against retaliatory termination was not preempted, even though the employer's rationale for firing an employee necessarily related to "working conditions"). Regardless of whether drug testing is a "properly negotiable subject of collective bargaining" in the abstract, the relevant inquiry under *Livadas* and *Lingle* should have been whether the resolution of the employee's state law privacy challenge necessarily required interpretation of relevant provisions of the CBA. To the

extent our prior cases held or implied that preemption was proper because of the mere possibility that the subject matter of the claim was a proper subject of the collective bargaining process, whether or not specifically discussed in the CBA, we today hold such statements to be an incorrect articulation of § 301 preemption principles. A state law claim is not preempted under § 301 unless it necessarily requires the court to interpret an existing provision of a CBA that can reasonably be said to be relevant to the resolution of the dispute.

III.

We turn now to the specifics of the case before us. In arguing in favor of dismissal, Consolidated cites provisions of the CBA it negotiated with the International Brotherhood of Teamsters, Local No. 63, claiming these provisions brought its covert surveillance within the purview of the CBA. Article 26, Section 2 of the agreement forbids the use of camera surveillance for disciplinary reasons except to prove a charge of property theft or dishonesty. The section also specifies the procedure to be employed for the use of videotapes in the context of theft or dishonesty allegations.[5] Article 35, Section 3 discusses alcohol and drug use and the procedures to be employed for drug testing. Consolidated contends that any employee claim based on its covert restroom surveillance requires recourse to these provisions of the CBA to determine the employees' reasonable

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5 The relevant section reads as follows:

> The Employer may not use video cameras to discipline or discharge an employee for reasons other than theft of property or dishonesty. If the information on the video tape is to be used to discipline or discharge an employee, the Employer must provide the Local Union, prior to the hearing, an opportunity to review the video tape used by the Employer to support the discipline or discharge. Where a Supplement imposes more restrictive conditions upon use of video cameras for discipline or discharge, such restrictions shall prevail.
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> National Master Freight Agreement, Article 26, § 2.

expectations of privacy. Without such an analysis, Consolidated argues, the court would be unable to determine whether these expectations were violated.

As discussed above, we may look to a CBA to determine whether a plaintiff's claim necessarily implicates its terms without "interpreting" the agreement, as that word is used in the context of § 301 preemption. *See Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1409-10 (9th Cir. 1992); *see also Balcorta*, 208 F.3d at 1108; *Ramirez*, 998 F.2d at 748. Doing so here, we find Consolidated's argument unpersuasive. The plaintiffs based their claims on the protections afforded them by California state law, without any reference to expectations or duties created by the CBA. Their claims are neither founded directly upon rights conferred in the CBA nor "substantially dependent upon" interpretation of the CBA terms. *Caterpillar*, 482 U.S. at 394. Rather, those claims are based on California's constitutional and statutory rights of privacy guaranteed to all persons, whether or not they may happen to work subject to a CBA. Although some such rights of privacy might well be subject to negotiation and be conditioned by the terms of a CBA, that is not the case here. The claims are independent of the CBA and not subject to § 301 preemption.

Consolidated's insistence that we must refer to the CBA because one provision mentions drug use and another contemplates the use of surveillance videotapes in certain specified circumstances does not change our analysis. Neither of these provisions purports to have any bearing on secret spying on Consolidated's employees in company restrooms—no matter how well-intentioned Consolidated's alleged purpose may have been in doing so. Indeed, the surreptitious nature of the violation of plaintiffs' privacy belies any notion of bargaining or consent to hidden cameras behind two-way mirrors. Consolidated cannot create a dispute as to the meaning of the terms of the CBA by picking out terms that refer to videotapes and drug use, particularly when a cursory examination of those provisions makes clear they apply to a completely different context and set of

circumstances.[6] In short, this is a classic example of a defendant's attempt to "inject[ ] a federal question into an action that asserts what is plainly a state-law claim [in order to] transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Caterpillar*, 482 U.S. at 399. The Supreme Court

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[6] The dissent appears willing to indulge in some unwarranted assumptions to lend credibility to Consolidated's attempt to invoke the CBA to justify its use of hidden cameras in the bathrooms. First, it transforms the CBA's silence on the use of videocameras (as distinguished from the use of videotapes) into an implied consent to secret taping from behind two-way mirrors. Second, asserting that Consolidated positions *visible* videocameras on its premises, including two "presumably visible" cameras in a different restroom, the dissent imputes to employees a willingness to sacrifice their privacy to *secret* restroom cameras. As an initial matter, it is not at all clear from the record that we can "presume" the visibility of any cameras Consolidated may have placed in its restrooms. Cramer's counsel stated at oral argument that any other restroom cameras were placed in the ceiling, hidden from view in a fake sprinkler head. In any event, the presence of visible cameras does not imply the expectation of or consent to additional secret cameras. Finally, notwithstanding that the California legislature has explicitly criminalized the use of videotaping through two-way mirrors, the dissent would override that clear statement of California law to indulge Consolidated's creative reading of the CBA. With respect, the dissent's approach illustrates the lengths to which one must go to tease preemption out of the contents of the CBA and plaintiffs' claims here. The dissent's reliance on *In re Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992), is misplaced. There, the video camera was located "in the ceiling of the entrance hallway, which enabled the [employer] to record who entered and left the locker room, and when, but not what they were doing inside." *Id.* at 707; *see also Brazinski* v. *Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993) ("It turned out to be infeasible to conceal the camera in the ceiling outside the locker room pointing toward the door, so instead the company installed it in the ceiling of the locker room itself, though pointing toward the door rather than toward the interior of the room."). Insofar as is apparent from the opinion, Amoco's installation of the camera did not violate any state laws. *Id.* at 1183 (noting specifically that the employer's action had not been made illegal under Illinois law).

has instructed that we are not to reward defendants who engage in such hypothetical exercises. *See id.*[7]

We need not "interpret" the CBA to see that it does not contemplate the surreptitious videotaping plaintiffs challenge in their state law claim. Consulting the CBA reveals the absence of such a provision. The district court's determination that the claim was preempted under § 301 was therefore erroneous.

IV.

Even if the CBA did expressly contemplate the use of two-way mirrors to facilitate detection of drug users, such a provision would be illegal under California law, and it is well established in California that illegal provisions of a contract are void and unenforceable. *See Hedges* v. *Frink*, 163 P. 884, 885 (Cal. 1917); *Holm* v. *Bramwell*, 67 P.2d 114, 117 (Cal. Dist. Ct. App. 1937). Section 653n of the California Penal Code makes the installation and maintenance of two-way mirrors permitting the observation of restrooms illegal without reference to the reasonable expectations of those so viewed. Determination of guilt under the statute is not dependent on context or subjective factors; use of the mirrors is a per se violation of the penal code, and an assumption that the mirrors will not be used is per se reasonable. *See In re Deborah C.*, 635 P.2d 446, 452 n.9 (Cal. 1981); *People* v. *Metcalf*, 98 Cal. Rptr. 925, 927 (Ct. App. 1971).[8]

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[7] Even if Consolidated alleged that the plaintiffs' union had waived their state law right to privacy in its negotiation of the CBA, evidence of such a waiver would need to be "clear and unmistakable" before a court could even consider whether to give it effect. *See Livadas*, 512 U.S. at 125; *Lingle*, 486 U.S. at 409-10 n.9. The record in this case contains no such evidence.

[8] Consolidated argues that § 653n does not apply because California courts have limited the statute's scope to public restrooms. Consolidated misreads the law. As noted in both *Deborah C.* and *Metcalf*, § 653n reflects a public policy protecting individuals from *surreptitious* observation in *all* restrooms, public as well as private.

Under settled Supreme Court precedent, "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers*, 471 U.S. at 212; *see also Galvez* v. *Kuhn*, 933 F.2d 773, 777 (9th Cir. 1991) (noting that a state prohibition of illegal conduct applies regardless of the terms of a particular contract). Consolidated was therefore required to abide by the provisions of California penal law, and its employees had a right to assume their employer would obey the law.[9] This assumption is inherently reasonable. Indeed, any contrary assumption would be irrational, because illegal behavior is unreasonable. *See Miller* v. *AT & T Network Sys.*, 850 F.2d 543, 550 n.5 (9th Cir. 1988) (explaining that criminal behavior is, by virtue of its illegality, per se unreasonable). Even if the CBA purported to reduce or limit this expectation in some way, that reduction would be illegal and therefore unenforceable. Because installation of two-way mirrors is immutably illegal, and freedom from the illegality is a "nonnegotiable state-law right[ ]," a court reviewing plaintiffs' claims that their privacy rights were violated need not interpret the CBA to arrive at its conclusion. *Allis-Chalmers*, 471 U.S. at 213. By definition, therefore, plaintiffs in this action were reasonable in expecting to be free of the two-way mirrors and hidden video cameras installed in the restrooms.

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[9] Consolidated argues that the terms of CBAs affecting employees in multiple states should supersede inconsistent state laws. This contention overreaches, however, because the LMRA certainly did not give employers and unions the power to displace any state regulatory law they found inconvenient. *See Allis-Chalmers*, 471 U.S. at 211-12 ("Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation * * *. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.").

Consolidated argues that, under California law, violation of a right to privacy is necessarily context-dependent; if an individual consents to a certain action, even an invasive one, she cannot then claim her privacy rights were violated by the action. *See Stikes,* 914 F.2d at 1270. It cannot substantiate this blanket proposition. The cases Consolidated cites in support of its position involved mandatory drug testing in the workplace. *See Schlacter-Jones,* 936 F.2d at 437; *Utility Workers,* 852 F.2d at 1085; *Laws,* 852 F.2d at 433. To the extent the *result* in any of these cases may have been correct under the law as set forth in today's opinion, that result is irrelevant to the question before us. The conduct at issue here is fundamentally distinct from the imposition of mandatory urinalysis. When companies employ drug testing, the parameters of the tests are often outlined in CBAs so that employees know exactly what to expect. Moreover, drug testing, unlike covert restroom surveillance, is not performed surreptitiously and—most importantly—is not illegal under state law.

In any event, Consolidated relies on the expansive language in our earlier decisions—which we have today disavowed—indicating that challenges to drug testing must be preempted because drug testing is "a properly negotiable subject for purposes of collective bargaining." *Utility Workers,* 852 F.2d at 1086. As discussed above, this language is not controlling; indeed, the Supreme Court came to precisely the opposite conclusion in *Lingle*: "[E]ven if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 purposes." 486 U.S. at 409-10. That a claim involves an issue theoretically subject to collective bargaining is irrelevant if the specific claim at issue may be resolved without interpretation of the CBA. *See Balcorta,* 208 F.3d at 1108 n.10.

Nor does California state court precedent support Consolidated's argument about the necessarily contextual nature of determinations concerning privacy rights. The California Supreme Court held in *Hill* v. *National Collegiate Athletic Association,* 865 P.2d 633 (Cal. 1994), that the NCAA's drug testing program did not violate student athletes' rights to privacy. This holding was based in part on the open and consensual nature of the testing, the complete information about the testing given to the athletes and the opportunity afforded them to refuse to participate. *Id.* at 659. Nothing in *Hill* suggests that *all* privacy determinations turn on issues of consent. Significantly, the court noted that the plaintiffs did not allege the NCAA's program was "contrary to law or public policy."[10] *Id.* at 660. In this case, conversely, plaintiffs made just such an allegation. Furthermore, their contention is supported by California law. The California Supreme Court has described § 653n as "express[ing] a legislative policy against 'clandestine observation of public restrooms,' rendering it 'reasonable for users thereof to expect that their privacy will not be surreptitiously violated.' " *Deborah C.,* 635 P.2d at 452 n.9 (quoting *Metcalf,* 98 Cal. Rptr. at 927). Issues of privacy implicated by drug testing programs may well be context-dependent. Issues of privacy implicated by the use of two-way mirrors for surreptitious surveillance are not.

Because a CBA cannot validly sanction illegal action, we hold the terms of the CBA were irrelevant to plaintiffs' claim of privacy violation. The district court's finding of preemption was therefore improper.

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[10] The dissent misapprehends the elements of California's privacy law, relying on *Alarcon* v. *Murphy,* 248 Cal. Rptr. 26, 29 (Ct. App. 1988), a court of appeal case decided before Hill. *See Hill,* 865 P.2d at 657 (stating elements of invasion of privacy). In any event, as discussed in text and as a careful reading of *Hill* indicates, Consolidated's videotaping invaded plaintiffs' privacy as a matter of law, thereby satisfying any need to establish both an objective and a subjective expectation of privacy.

V.

Alfaro and his co-plaintiffs also alleged a claim of intentional infliction of emotional distress. To demonstrate intentional infliction of emotional distress, a plaintiff must show the defendant's conduct was "extreme and outrageous." *Sabow* v. *United States,* 93 F.3d 1445, 1454 (9th Cir. 1996) (applying California law). As we explained in *Miller:*

> [Emotional distress] claims may not be preempted if the particular offending behavior has been explicitly prohibited by mandatory statute or judicial decree, and the state holds violation of that rule in all circumstances sufficiently outrageous to support an emotional distress claim. For example, if a plaintiff alleges that an employer's criminal behavior inflicted extreme emotional distress, the emotional distress claim need not be preempted. The behavior could be found sufficiently outrageous to permit recovery without regard to whether the behavior might be permitted under the CBA. Its outrageousness would be clear from the state's decision to make the behavior criminal * * *. Additionally, if the particular CBA does not govern the offending behavior, * * * then an emotional distress claim is not preempted.

Miller, 850 F.2d at 550 n.5; *see also Galvez,* 933 F.2d at 779-80. The conduct at issue here was a violation of California penal law, and therefore per se outrageous. Accordingly, § 301 does not preempt the emotional distress claim alleged by Alfaro and his co-plaintiffs to the extent the claim is premised on Consolidated's criminal use of hidden cameras and two-way mirrors in restrooms to conduct clandestine surveillance.

Conclusion

Section 301 does not preempt claims to vindicate nonnegotiable state law rights. Nor does it preempt claims for state law rights that, although potentially negotiable, do not reasonably require the court to interpret an existing

provision of a CBA to resolve the dispute. Plaintiffs' privacy claims are therefore not preempted by § 301. The Alfaro plaintiffs' claim for intentional infliction of emotional distress is likewise not preempted.

Because the state law privacy claims in these cases were not preempted by § 301, the district court lacked removal jurisdiction over these actions. They must therefore be remanded to state court.

REVERSED and REMANDED.

TALLMAN, Circuit Judge, concurring in part and concurring in the judgment:

I agree with parts I, II, and III of the majority opinion: plaintiffs' claims are not preempted because the CBA did not contemplate surreptitious surveillance of bathrooms through two-way mirrors. However, the Court's alternative holding unnecessarily interprets ambiguous California law and threatens the ability of similarly situated parties to negotiate legitimate limitations on privacy. I respectfully disagree with parts IV and V of the majority opinion.

California law clearly protects individuals from *covert* observation in certain traditionally private places, such as restrooms and fitting rooms. *See* Cal. Penal Code § 653n. Rather than merely hold that Consolidated's covert actions here were illegal, the Court today holds that even in future contract negotiations, the parties could not reduce privacy expectations in the bathrooms of California workplaces. *See* Maj. Op. at 695-96 ("Even if the CBA purported to reduce or limit this expectation in some way, that reduction would be illegal and therefore unenforceable."). It is not clear to me that California courts would preclude such negotiations between well-represented parties if there were a compelling reason to permit observation. *See, e.g., Hill* v. *NCAA*, 865 P.2d 633, 655 (Cal. 1994) ("[T]he presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant."); *In re Deborah C.*, 635 P.2d 446, 452 n.9 (Cal.

1981) ("[S]ection 653n is limited to a method of hidden spying * * * [not] that restrooms and fitting rooms are immune from all observation.").

It also appears that the majority's broad statement in its alternative holding threatens multi-state employers' ability to fulfill federally mandated safety requirements by negotiating with their employees. In light of the ambiguity in California law and the fact that we are remanding the claims to state court because the federal courts lack jurisdiction, a more narrow holding by this Court is clearly preferable.

O'SCANNLAIN, Circuit Judge, dissenting:

I respectfully dissent from the Court's opinion in this very sensitive application of the federal Labor Management Relations Act ("Act") to a freely negotiated collective bargaining agreement ("CBA") between Consolidated Freightways ("Consolidated") and its union-member employees.

No doubt, the majority is correct in the formulation of the rule we should apply in this case: the plaintiffs' state law claim is preempted under Section 301 of the Act if Consolidated can assert a "reasonable" invocation of a provision of the CBA which makes the resolution of the plaintiffs' claim depend on its interpretation. Maj. Op. at 688. Such formulation is familiar and is substantially similar to that used in other Circuits. *E.g.*, *Martin* v. *Shaw's Supermarkets, Inc.*, 105 F.3d 40, 42 (1st Cir. 1997) ("[S]ection 301 preempts a state-law claim wherever a court, in passing upon the asserted state-law claim, would be required to interpret a *plausibly disputed* provision of the collective bargaining agreement." (emphasis added)); *Brazinski* v. *Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181 (7th Cir. 1993) (noting that state law privacy claim was preempted because "it was *arguably* within the scope of the [collective bargaining] agreement" (emphasis added)). Regrettably, the majority fails in its application of the rule to the CBA at issue in this case.

Because the CBA expressly provides for video surveillance of its covered employees, it cannot be so cavalierly ignored as the majority holds. Because the CBA can be reasonably interpreted to affect materially the resolution of the plaintiffs' state law claim here, their state law claim is preempted under federal law and therefore I must dissent.

I

Remarkably, the majority chooses to reach alternative holdings. In Part III, it concludes, with little elaboration, that Consolidated cannot assert even a reasonable interpretation of the CBA that makes its interpretation necessary to resolve the plaintiffs' claim. Maj. Op. at 694. ("[A] cursory examination of those provisions makes clear they apply to a completely different context and set of circumstances."). In Part IV, the majority holds that, even if Consolidated could make such an argument, the California Penal Code trumps. Maj. Op. at 695 ("Even if the CBA did expressly contemplate the use of two-way mirrors to facilitate detection of drug users, such a provision would be illegal under California law * * *"). Neither holding is compelling.

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As to the analysis in Part III, the elements of a right to privacy cause of action under California law require these plaintiffs to show, among other things, 1) that they had a subjective expectation of privacy in the restroom, and 2) that their subjective expectation of privacy was reasonable. *Alarcon* v. *Murphy*, 248 Cal. Rptr. 26, 29 (Ct. App. 1988) ("To determine whether there has been a violation of Alarcon's constitutional right of privacy, we determine whether his *personal and objectively reasonable expectation* of privacy has been infringed * * *" (emphasis added)).

To what sources of information must we look in order to determine, under California law, whether an employee has a subjective and objectively reasonable expectation of privacy? The California Supreme Court tells us this much: "[T]he presence or absence of opportunities to consent voluntarily to

activities impacting privacy interests obviously affects the expectations of the participant." *Hill* v. *NCAA*, 865 P.2d 633, 655 (Cal. 1994). And where might have the plaintiffs here had the "opportunit[y] to consent voluntarily" to the videotaping of which they complain? They had such an opportunity every time they entered the terminal in which they were videotaped. The record shows that Consolidated placed no fewer than six signs in and around the terminal housing the restroom which read: "*NOTICE!* 24 Hour Surveillance Recorded on Videotape." This is hardly irrelevant to their objective *and* subjective expectations of privacy.[1]

But more important to the purposes of preemption, the plaintiffs had an "opportunit[y] to consent voluntarily" to the videotaping in the CBA they signed with their employer. In the section entitled "Use of Video Cameras for Discipline and Discharge," the CBA provides:

> The Employer may not use video cameras to discipline or discharge an employee for reasons other than theft of property or dishonesty. If the information on the video tape is to be used to discipline or discharge an employee, the Employer must provide the Local Union, prior to the hearing, an opportunity to review the video tape used by the Employer to support the discipline or discharge. Where a Supplement imposes more restrictive conditions

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[1] In addition, the record indicates that the Riverside County Sheriff's Department investigated the use of video cameras in the men's restroom of Consolidated's facilities and found two additional video cameras in the ceiling in a different men's employees restroom which were not behind two-way mirrors and which were presumably visible. This served to put the plaintiffs further on notice that they may have been subject to videotaping in the restrooms of Consolidated's facilities.

Curiously, Consolidated's Supplemental Brief asserts that there was a second video camera in the ceiling of the restroom in which the two-way mirror and hidden camera were discovered. Such assertion is belied by the Sheriff's investigation report.

upon the use of video cameras for discipline or discharge, such restrictions shall prevail.

This provision of the CBA makes explicit two things. First, the plaintiffs consented to be videotaped by Consolidated, subject to the restriction that the videotaping was for the purpose of "discipline or discharge" related to "theft of property or dishonesty." Second, the plaintiffs contemplated that they might want to place additional restrictions on Consolidated's use of video cameras through the mechanism of a "Supplement."[2] A number of "Supplements" were agreed to between the plaintiffs and Consolidated. None of the terms in these "Supplements," however, placed any additional restrictions on Consolidated's use of video cameras.

What this provision of the CBA does *not* make explicit is whether Consolidated may use video cameras in the restroom, or whether Consolidated may use video cameras behind a two-way mirror. Of course, nor does it make explicit whether Consolidated may use video cameras in the hallway, or whether Consolidated may use video cameras on a tripod. I do not understand the majority to suggest, however, that a "cursory examination" of the CBA "makes clear" that Consolidated is barred from putting cameras in the hallway or from putting cameras on tripods. This, no doubt, is the case because, although the CBA does not explicitly say that Consolidated may do such things, nor does it explicitly say that Consolidated may *not* do such things.

Thus, the contract is silent, as contracts often are, on whether Consolidated's precise behavior is allowed. And, using traditional principles of contract interpretation, one could very easily make a reasonable argument that this silence should be interpreted to mean that the plaintiffs

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[2] The term "Supplement" in this provision means a "Supplemental Agreement" setting forth additional terms to "each of the specific types of work performed by the various classifications of employees controlled by this Master Agreement."

consented to Consolidated's behavior. Such an argument might take the following form: 1) the CBA explicitly places but one restriction upon Consolidated's use of video cameras; 2) the CBA contemplates that additional explicit restrictions might be placed thereupon; 3) no such additional explicit restrictions were ultimately imposed; 4) thus, one could reasonably conclude that the only restriction the CBA imposes on Consolidated's use of video cameras is the one explicitly set forth.[3] Because the contract does not restrict the use of video cameras to areas other than the restroom, or to positions other than behind a two-way mirror, one could reasonably conclude that the plaintiffs in this case consented to the very videotaping on which their state law privacy claim is based. Accordingly, in order to resolve the plaintiffs' state law privacy claim, the Court must resort to interpretation of the CBA to determine whether this reasonable argument is a winning one.[4]

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3 The reporters are replete with cases employing such an interpretative method. *E.g.*, *Republic Pictures Corp.* v. *Rogers*, 213 F.2d 662, 665 (9th Cir. 1954) ("[C]ourts are loathe to impose limitations or restrictions upon the parties which are not expressly contained in their agreement or which do not arise by necessary implication, and without such implied restrictions the contract could not be effectively performed * * *"); *see also* Margaret N. Kniffin, 5 Corbin on Contracts § 24.28 (Revised Ed. 1998) ("If the parties in their contract have specifically named one item * * * a reasonable interpretation is that they did not intend to include other, similar items not listed.").

4 The majority apparently feels that this legal effort to determine whether there is a reasonable argument that the plaintiffs consented in the CBA to the videotaping is beside the point because it instead relies on the surmise that "the surreptitious nature of the violation of plaintiffs' privacy belies any notion of bargaining or consent to hidden cameras behind two-way mirrors." Maj. Op. at 694. By this statement, I understand the majority to be surmising that Consolidated would not need to hide cameras behind a two-way mirror if it truly thought that the plaintiffs had consented to the videotaping. With all due respect to the majority, our job is not to engage in dubious surmises about the thoughts of the parties, but, rather, to engage in the traditional legal analysis to be followed in section 301 preemption cases like the one before us. At another point, the majority also appears to argue that the plaintiffs' state law rights can be preempted only by a "clear and

Not only is there a reasonable argument that the plaintiffs consented in the CBA to the videotaping, but Consolidated's argument in this regard is much stronger than arguments other courts have accepted for the purposes of finding preemption. For example, in a case remarkably similar to this one, the Seventh Circuit held that a suit which alleged that a company had violated state law privacy rights by installing video cameras in a restroom was preempted because the CBA may have authorized the practice, even though there was "not one word in the compact about cameras, locker rooms, or surveillance in general." *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 709-10 (7th Cir. 1992). The court based preemption on a "management-rights" clause that the company argued left everything "neither regulated nor forbidden" to "its discretion." *Id.* at 709. The court further noted that several courts had held state law privacy suits over employee drug tests preempted "whether or not the collective bargaining agreement expressly mention[ed] drug tests." *Id.* at 710. Needless to say, Consolidated's argument regarding the interpretation of

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unmistakable" waiver, rather than a "reasonable" argument regarding waiver, in the CBA. Maj. Op. at 692, 695 n.7. This would be the case, however, only if the plaintiffs' state law rights were "nonnegotiable." The Supreme Court made this clear in *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). The state law right at issue in *Lingle*, freedom from retaliatory discharge, was "nonnegotiable," *id.* at 407 n.7, because "under [state] law, the parties to a collective-bargaining agreement may not waive the prohibition against retaliatory discharge," *id.* at 409 n.9. Thus, "[before deciding whether such a state-law bar to waiver could be pre-empted under federal law by the parties to a collective-bargaining agreement, we would require 'clear and unmistakable' evidence in order to conclude that such a waiver had been intended." *Id.* at 409 n.9 (citations omitted). There is no "state-law bar to waiver" of the right to privacy in California. To the contrary, the California Supreme Court has held that the right to privacy can be extinguished by consent: "[T]he presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant." *Hill*, 865 P.2d at 655.

the CBA in this case, which does expressly authorize videotaping, is far more plausible than these.[5]

2

In Part IV, the majority relies on the California Penal Code to conclude that, even if one could reasonably argue that the employees consented in the CBA to Consolidated's videotaping, such consent does not matter. In order to reach this conclusion, the majority must rewrite California law.

To repeat: the elements of a right to privacy cause of action under California law require these plaintiffs to show two things: 1) that they had a subjective expectation of privacy in the restroom, and 2) that their subjective expectation of privacy was reasonable.[6] *Alarcon,* 248

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[5] The majority's attempt to distinguish these cases is non-responsive. Maj. Op. at 694 n.6. The fact that the videotaping in these cases was not done, as far as we know, in violation of state criminal laws cannot save the majority's holding in *Part III* of its opinion. As I understand Part III, the majority holds that, without even considering the California criminal law, Consolidated cannot make a reasonable argument that the plaintiffs consented in the CBA to its videotaping. The majority does not invoke the California criminal law until its holding in Part IV of its opinion, which, as explained below, is deficient for separate reasons.

[6] The majority appears to argue that the elements of a right to privacy cause of action under California law do not require the plaintiffs to show that they had a subjective expectation of privacy in the restroom. Maj. Op. at 696-67 n.10. The majority appears to suggest that this is the case because *Hill* altered the elements recited in *Alarcon. Id.* I respectfully disagree. Nowhere in *Hill* did the Supreme Court state that it was overruling the understanding in *Alarcon.* Moreover, although Hill did not use the phrase "subjective expectation of privacy," it included as the second element of the cause of action "a reasonable expectation of privacy on the plaintiff's part." *Hill,* 865 P.2d at 655. I take this to mean that the plaintiff must show both that he had an expectation of privacy and that it was reasonable. This view is confirmed by the fact that the Court explained this element by noting that "the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant." *Id.* Indeed, in fashioning the elements of the right

Cal.Rptr. at 29. The majority concludes that, because Consolidated's videotaping is presumably a misdemeanor under California Penal Code § 653n,[7] any expectation of

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to privacy under the California Constitution, the Supreme Court drew upon both the California common law right to privacy and the federal constitutional right to privacy, *id.* at 865 P.2d 633, both of which include a subjective expectation of privacy as one of their elements. *Id.* at 865 P.2d 633 ("The plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of the defendant."); *California* v. *Greenwood,* 486 U.S. 35, 39 (1988) ("[T]he Fourth Amendment [is violated] only if respondents manifested a subjective expectation of privacy *** that society accepts as objectively reasonable.").

[7] It is far from clear whether Consolidated's videotaping violated § 653n. The majority assumes *arguendo* in Part IV that there is a reasonable argument that the plaintiffs consented in the CBA to the videotaping, but it nonetheless holds that the videotaping was illegal. In doing so, the majority extends California law in a manner that appears to contradict decisions by the California Supreme Court. Although the text of § 653n does not limit liability to "non-consensual" viewing, the California Supreme Court has appeared to do just that. In *People* v. *Triggs,* 506 P.2d 232 (Cal. 1973), the Supreme Court held that a criminal defendant had a reasonable expectation of privacy in a restroom on account of § 653n. *Id.* at 238. In a subsequent decision, however, the Supreme Court clarified that Triggs extended only to "clandestine, *unexpected*" viewing. *In re Deborah C.,* 635 P.2d 446, 452 (Cal. 1981) (emphasis added). The Court based this clarification on the fact that "section 653n is limited to a method of *** clandestine observation" and "implies no belief that restrooms and fitting rooms are immune from all observation." *Id.* at 452 n.9 (internal quotation marks omitted). Thus, it appears that one of the modes of "observation" from which § 653n does not make the plaintiffs "immune" is an "expected" viewing from behind a two-way mirror. Such a viewing would be "expected" if the plaintiffs consented to it in the CBA. Indeed, to interpret § 653n otherwise (i.e., in the manner advanced by the majority) would allow the State to prosecute criminally someone who erects a two-way mirror at the *invitation of* the person he is videotaping! In addition to the reasonable argument that the plaintiffs consented in the CBA to Consolidated's viewing, there are other facts which suggest that Consolidated's viewing was not "unexpected" to the plaintiffs, and, therefore, not in

privacy the plaintiffs had in the restroom was reasonable as a matter of law. Fair enough. But this only establishes the second prong of the required showing; it does not establish the first prong, whether the plaintiffs had a *subjective* expectation of privacy in the restroom. Before the plaintiffs can establish that, the Court must resort to interpretation of the CBA to determine whether they consented to the videotaping.

Astonishingly, the majority ignores this first prong altogether. Which perhaps is unsurprising because there simply is no decision of the California Supreme Court which holds as a matter of law that one has a subjective expectation of privacy from illegal intrusions to which one has consented. Moreover, I doubt that there will ever be such a holding of the California Supreme Court. This is likely because, if the California Supreme Court did make such a holding, it would lead to the ridiculous situation in which I could *invite* someone to videotape me behind a two-way mirror, only to then turn around and sue that person for violating my right to "privacy."

Nonetheless, this is the interpretation of California law urged upon us by the majority in this case. As support, the majority can only muster the following assertion: "Nothing in *Hill* suggests that *all* privacy determinations turn on issues of consent." Maj. Op. at 696. This is true. *Hill* never used the word "all." Instead, it used the word "obviously" "[T]he presence or absence of opportunities to consent voluntarily to

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violation of § 653n. As already noted, Consolidated placed no fewer than six signs in and around the terminal in which the plaintiffs were videotaped that read: *"NOTICE!* 24 Hour Surveillance Recorded on Videotape." Moreover, there were two other video cameras in another restroom which were not behind two-way mirrors and which were presumably visible. Finally, it is not surprising that following the Sheriff's investigation referred to in footnote 1, the Riverside Country District Attorney decided not to file any criminal charges against Consolidated, stating that "the conduct involved was not motivated by an intent that would warrant criminal prosecution."

activities impacting privacy interests obviously affects the expectations of the participant." *Hill*, 865 P.2d at 655 (emphasis added). What was "obvious" to the California Supreme Court in *Hill* should be obvious to everyone else who considers the question: a person's subjective expectation of privacy from an intrusion turns on whether he consented to the intrusion. The majority's conclusion otherwise can only be explained as an attempt to rewrite California law.

II

It is clear that the plaintiffs consented in the CBA to video surveillance. It is at least a "reasonable" interpretation of the CBA that the plaintiffs additionally consented therein to video surveillance behind two-way mirrors. Whether this reasonable interpretation is a winning one is a question that can be answered only by interpreting the CBA in the appropriate forum. Therefore, the plaintiffs' state law claim is preempted. This does not mean, of course, that the plaintiffs in this case have no remedy at all. It simply means that the plaintiffs must pursue their remedies under federal rather than state law. Indeed, the plaintiffs in this case submitted their claim to the grievance process provided for in the CBA, and they *prevailed*. Thus, not only are the majority's efforts misguided, but unnecessary as well. For these reasons, I respectfully dissent.[8] *

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[8] I also dissent from Part V of the Court's opinion. The majority rests its conclusion in this Part on our decision in *Miller* v. *AT & T Network Systems*, 850 F.2d 543 (9th Cir. 1988). But, in *Miller*, regarding the tort of intentional infliction of emotion distress, we said: "Because the tort requires inquiry into the appropriateness of the defendant's behavior, the terms of the CBA can become relevant in evaluating whether the defendant's behavior was reasonable. Actions that the collective bargaining agreement permits might be deemed reasonable in virtue of the fact that the CBA permits them." *Id.* at 550. Only if "the particular CBA does not govern the offending behavior * * * [will] an emotional distress claim [not be] preempted." *Id.* at 550 n.5.

* As explained above, there is a reasonable argument that the CBA governs Consolidated's behavior in this case, and, therefore, the plaintiffs' intentional infliction of emotional distress claim is preempted

as well. Moreover, even if Consolidated's behavior constituted a misdemeanor under California law, which, as I noted above, is doubtful, it would not foreclose preemption: "we cannot assume that the employer's behavior was outrageous for purposes of an emotional distress claim just because the employer may have violated a statutory prohibition 8 * * *." *Id.* at 551.

APPENDIX B

[August 27, 2001]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-55657, 98-56041 and 98-56154

LLOYD W. CRAMER; DANIEL E. LIPICH,
Plaintiffs-Appellants,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Defendant-Appellee.

GUILLERMO ALFARO,
Plaintiff,

and

DENNIS R. BLEVINS; RAY R. CASIO; STEVE CUNNINGHAM; RICK DEWOODY; ALEJANDRO GARCIA; DAVID V. GARCIA; RAUL C. GARCIA; JAMES A. GRECO; BRUCE A. HARVEY; JOHN K. HATFIELD; ROBERT W. HATFIELD; LEE A. INGRAM; ZENO KING, JR., JOHN L. LACROIX; GREGORY A. LANDAVAZO; MELVIN LEO LEWIS; ENRIQUE LOPEZ; HERBERT MARCUS; IGNACIO V. OCHOA; BRIAN K. PAGNE; MANUEL PARRA; JAMES A. PROITTE; CARLOS RIVERA; HAROLD JAMES TAYLOR, JR.; THOMAS A. SCOTT; DAVID

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Plaintiffs-Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION, A DELAWARE CORPORATION; CNF TRANSPORTATION, INC., A DELAWARE CORPORATION, AKA CONSOLIDATED FREIGHTWAYS, INC.; MARK EPSTEIN, AN INDIVIDUAL; DOUGLAS SCHUSTER, AN INDIVIDUAL; DOE SECURITY INSTALLATION COMPANY,

Defendants-Appellees.

CHARLES R. DAVIDSON, H; GUILLERMO ALFARO; DAVID FITZHUGH; STEVEN B. BUGARIAN; IGNACIO LAWTON; DREW WHEAT; DONALD STUBBLEFIELD,

Plaintiffs,

and

THERESA HOFFMAN; MASAO SHOBE,
Plaintiffs-Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION, A DELAWARE CORPORATION, AKA CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; CNF TRANSPORTATION, INC., A DELAWARE CORPORATION, AKA CONSOLIDATED FREIGHTWAYS; MARK EPSTEIN, AN INDIVIDUAL; DOUGLAS SCHUSTER, AN INDIVIDUAL,
Defendants-Appellees.

Nos. 98-55657, 98-56041 and 98-56154

ORDER

The opinion filed June 15, 2001 is amended as follows:

At slip op. 7529, the first sentence of the first paragraph shall end after "illegal under California law." The portion reading ", and it is well established in California that illegal provisions of a contract are void and unenforceable. *See Hedges* v. *Frink*, 163 P. 884, 885 (Cal. 1917); *Holm* v. *Bramwell*, 67 P.2d 114, 117 (Cal. Dist. Ct. App. 1937)." shall be deleted.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-55657, 98-56041 and 98-56154

LLOYD W. CRAMER; DANIEL E. LIPICH,
Plaintiffs-Appellants,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Defendant-Appellee.

GUILLERMO ALFARO,
Plaintiff,

and

DENNIS R. BLEVINS; RAY R. CASIO; STEVE CUNNINGHAM; RICK DEWOODY; ALEJANDRO GARCIA; DAVID V GARCIA; RAUL C. GARCIA; JAMES A. GRECO; BRUCE A. HARVEY; JOHN K. HATFIELD; ROBERT W. HATFIELD; LEE A. INGRAM; ZENO KING, JR., JOHN L. LACROIX; GREGORY A. LANDAVAZO; MELVIN LEO LEWIS; ENRIQUE LOPEZ; HERBERT MARCUS; IGNACIO V. OCHOA; BRIAN K. PAGNE; MANUEL PARRA; JAMES A. PROITTE; CARLOS RIVERA; HAROLD JAMES TAYLOR, JR.; THOMAS A. SCOTT; DAVID W. STEPHENS; J.B. STEWART; ALFONSO WAGNIR; LARRY A. WELLS; ROBERT P. WILLIAMS; ERIC J. WRIGHT; WILLIAM A. YESFORD; MIGUEL ABARAJAS; SANDRA RAY

AMBROSE; GUILLERMO AMESOLA; ABELARDO APUAN; MICHAEL VINCENT ARBANAS; CARLOS ARGANDORA; JOSE ABRIERO; MARCARIO ACELLANO; FERNANDO AVILA; MICHAEL E. BANNAN; ARNOLD A. BARAJAS; ROBERT BARRAS; MIKE BARTLEY; DAVID BARTON; JAN K. BEBER; WILLIAM OTIS BEGGS; CRAIG ANTHONY BERLENE; PAUL EUGENE BOATWRIGHT; BRIGIDO BOLIVAR; RAYMOND BONIA; RICHARD BOON; ROGER J. BRASS; GARY BROOKS; MICHAEL D. BROWN; JOANNE BRUMMER; SCOTT BUBIER; EDUARDO S. CARDENAS; MANUEL CARDONA; MARIO CARILLO; HARRIS A. CARTER; RICHARD CENICEROS; JACK CLARK; KENNETH L. CLARK; FERNANDO A. CLAVIJO; ROBERT L. CLINTON, RICHARD CONTRERAS; RANCE D. COOPER; ANTHONY CORDERO; ARMANDO CORDERO; JOHN L. CORDERO; RUDY H. COUTHART; CHARLES DAVIDSON, II; THOMAS DERSGHY; PHILIP DIGENOVA; CHARLES DIRNER; JIMMY DIXON; AL DORAME; EDDIE SHEPHERD; CLIFFORD J. FELTON; MIKE FITZGERALD; JOSE LUIS FLORES; RAFAEL O. FLORES; ED FOOR; JERRY FRANCE; ALBERT ALEX FRANCO; RAMON B. FRANCO; MICHAEL GAMBINO; ANTHONY GAPDORA; ROBER T. GARCIA; DONALD K. GLOVER; DAVID P. GOMEZ; MANUEL E. GONZALES; GERALD W. GOODWIN; DEVIN JONATHAN GORDON; JONATHAN J. GORDON; JERRY GOFORTH; BERNAL GREGETZ; JOSE GUTIERREZ; JESSE D. HALEY; JAMES HARPER, JR.; SANDRA HEATLEY; PATRICK L. HERON, JR.; RANDALL WILLIAM HOBBS; NARVELL E. HOOKS; STEVE HOPKINS; TIM HOSEA; GAYLE LYNN HAMPTON; JAMES HURLBURT; JOHN W. JACKSON; JAMES ROBINSON; WILLIAM JARRELL; ALFREDO JIMENEZ; GARY E. JOHNSON; PETER KARABAN; ROBERT M. KIRKLAND; LARRY RISSEL; CARY KNIGHT; ANNE M. KNUTZEN; PATRICK J. KNUTZEN; ERVIN KROLL; FRANK P. LAGUMINA; HERCLIO LEMUS; ELORIA REYES; RICHARD E. LUCERO; ENRIQUE MANCILLA; CLIFFORD E. MAPLES; GUILLERMO MARTIN; REGUIO MARTIN; GILBERT M. MARTINEZ; RONALD A. MATTHEWS;

DAVID E. MAY; MICHAEL J. MCCARTHY; DON R. MCCLARY; WILLIAM R. MCFARLAND; SAUL A. MCKECHAN; P.L. MEDINA; PEDRO A. MONGE; ALFRED MONTOYA; ARTHUR MORA; MARCOS MORALES; ROY L. MCFOOT; DEWAYNE MORTENSEN, II; MARK MULHERN; OSCAR MUNOZ; JOHN MURRAY; RAYNO NORDUCCI; HECTOR OCHOA; JORGE OCHOA; MICHAEL O'NEAL; LUIS E. ORTEGA; GILBERT GEORGE ORTIZ; VICTOR PARKER; DAVID PERALES; ISIDRO PERALES; ROBERT PORTILLO; ROBIN J. QUIGLEY; JOSEPH R. QUILTY, II; ROBERT REYNOSO; BRYAN RICHARD; CARLOS OROZCO RIVAS; GILBERT C. RIVERA; HOWARD ROBINSON; AUDIAS RODRIGUEZ; HUGO RODRIGUEZ; RUBEN RODRIGUEZ; TOMAS A. RODRIGUEZ; JOHN ROJAS; JAVIER ROMAN; ARMANDO ROMERO; ROBERT A. ROSAS; EUGENE A. ROSE; FRANCISCO J. RUIZ; C.W. RYAN; CATHERINE SCHATZ; DENNIS SCHATZ; STEVEN SCHILLING; NORMAN W. SCHOOLCRAFT; ERNIE SCOLARI; JOHN P. SOROUSE; JOSEPH SELCHO; JAMES SHINN; NATHAN SHROPSHIRE; RICHARD F. SHUMWAY; DAVID MANUAL SIERRAS; DAVID H. SMITH, JR.; ROBERT P. SMITH; CLARENCE SATTERLAND; JAMES BOBBY L. STONE; ALEJANDRO TIRADO; FABRIZIO TORRES; BRIAN UNZICKER; FRANK VALDEZ; MARIO A. VASQUEZ, JR.; MARIO A. VASQUEZ, SR.; RICHARD J. VARGAS; ALEXANDER VILLA, JR.; GUADALUPE REYES WAGGONER; WAYMOND A. WALKER; ROBERT WELSH; WILLIAM M. WESTON, JR.; ROBERT FRITZ WESTREICHER; JUDY LEN WILSON; GARY WAYNE YATES; DENNA JEAN YASANIA; DONALD RAY YODER; LYLE ARCHIBALD; EWALD BARTH; LEROTY O. BELL; HENRY CAMACHO; NICK J. CARENDER; K.W. CARRITHERS; JOSE CASILLAS; ARMANDO CORONADO; RICHARD COTA; DONALD K. CRONK; RICHARD JOSEPH DIAZ; JACK E. DOBSON; FRANCISCO ESPARZA; JOSE C. FLORES; ERNEST W. FRICK; RUDY GOMEZ; JOSEPH GONZALES; MICHAEL GROOM; JOAQUIN HERNANDEZ; JOHN ALFRED HILL; TERRY L. JOHNSON; OSCAR H. MARTIN; ELY

MCDONAGLE; FULTON L. MITCHELL; GRADY RICHARD NUTT; GILBERT ORTIZ, JR.; MICHAEL T. PAUCH; JEFFREY M. PHILLIPS; MICHAEL R. PRESTON; BILLY C. RATLEDGE; ALFRED G. RODRIGUEZ; GILBERT ROSALES; OLIVER SONJY; JOHN STURGES; DONALD F. WOODS; F. THOMAS THORNE; RONALD M. AUBERT; HARVEY GEORGE BEACH; PAUL EDWARD BECKER; HAROLD BURNLEY; KIM HARSHA; JOSEPH CHAVEZ; PAUL E. COX; JOSEPH DEFRANCIS; BILL JOE MCFARLAND; WILLIAM E. MULDOON; JOSE A. UDELL PETERSON; ANDREW SLAUGHTER; AMOS TAYLOR; JIM H. WILLOUGHBY; RICHARD ALVARADO; HENRY H. ANDRADE; GARY A. RAMIREZ; ARMAND S. RAMIREZ; MASAO SHOBE; NOBLE A. CARSON; ERIC G. FROMM; LUE G. GARY; RICHARD ANTHONY LEON; JAMES R. O' NEILL; JERRY STROTHER; TODD T. STEVENS,

Plaintiffs-Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION, A DELAWARE CORPORATION; CNF TRANSPORTATION, INC., A DELAWARE CORPORATION, AKA CONSOLIDATED FREIGHTWAYS, INC.; MARK EPSTEIN, AN INDIVIDUAL; DOUGLAS SCHUSTER, AN INDIVIDUAL; DOE SECURITY INSTALLATION COMPANY,

Defendants-Appellees.

CHARLES R. DAVIDSON, II; GUILLERMO ALFARO; DAVID FITZHUGH; STEVEN B. BUGARIAN; IGNACIO LAWTON; DREW WHEAT; DONALD STUBBLEFIELD,

Plaintiffs,

and

THERESA HOFFMAN; MASAO SHOBE,

Plaintiffs-Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION, A DELAWARE CORPORATION, AKA CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; CNF TRANSPORTATION, INC., A DELAWARE CORPORATION, AKA CONSOLIDATED FREIGHTWAYS; MARK EPSTEIN, AN INDIVIDUAL; DOUGLAS SCHUSTER, AN INDIVIDUAL,

Defendants-Appellees.

Nos. 98-55657, 98-56041 and 98-56154

Argued and Submitted February 9, 2000
Filed April 26, 2000

Appeals from the United States District Court for the Central District of California Irving Hill, District Judge, Presiding.* D.C. Nos. CV-97-07860-IH, CV-98-00331-LHM(ANx), CV-98-00332-LHM(ANx).

Before: O'SCANNLAIN,** RYMER, and FISHER, Circuit Judges.

RYMER, Circuit Judge:

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* These actions were assigned to Hon. Irving Hill, who entered judgment in *Cramer* v. *Consolidated Freightways, Inc.*, CV 97-7860-IH, No. 98-56154, *Alfaro* v. *Consolidated Freightways Corp.*, SA CV 98-331, No. 98-56041, and *Davidson* v. *Consolidated Freightways Corp. (Hoffman)*, SA CV 98-332-LMG, No. 98-56154, 209 F.3d 1122 (9th Cir. 2000) were reassigned following Judge Hill's death in March 1998 to Hon. Linda H. McLaughlin.

** Judge O'Scannlain was drawn to replace Judge Wiggins. He has read the briefs, reviewed the record, and listened to the oral argument tapes.

These appeals raise the familiar issue of when state law claims by employees covered by a collective bargaining agreement are preempted.[1] They all arise out of the surreptitious videotaping of restrooms through two-way mirrors, an activity that is arguably criminal in California. Employees at the trucking terminal where this happened filed related actions seeking recovery from their employer, Consolidated Freightways Corporation of Delaware, for invasion of privacy (*Cramer* and *Alfaro*); emotional distress *Alfaro*); and discharge in retaliation for their own conduct related to the surveillance (*Hoffman*). The district court held that all the claims in each action are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185,[2] because determining whether privacy rights have been violated requires an interpretation and application of the collective bargaining agreement. The employees contend otherwise, primarily for the reason that parties to a collective bargaining agreement cannot negotiate for considerations that violate criminal statutes. Following a long line of authority in this circuit, we agree with the district court in *Cramer* and *Alfaro* that adjudication of these civil claims based on privacy rights depends on the reasonableness of the employees' expectations and this, in turn, depends on the extent to which they may have bargained away their privacy interests. Therefore these claims are preempted, whether or not the specific conduct at issue may also be subject to

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1 *Cramer* v. *Consolidated Freightways, Inc.*, No. 98-55657, and *Alfaro* v. *Consolidated Freightways Corp.*, No. 98-56041, were consolidated in the district court and for calendaring purposes on appeal. We consider the invasion of privacy claim that is common to both *Cramer* and *Alfaro* in Part II, and the emotional distress claim and other statutory claims raised only in *Alfaro* in Part III. We also heard argument on the appeal in a related case, *Hoffman* v. *Consolidated Freightways*, No. 98-56154, at the same time. Counsels' cooperation in presenting a coordinated argument was helpful and appreciated by the court. The issues raised in *Hoffman* are slightly different, as the claims are for retaliatory discharge in violation of public policy. We address these claims in Part IV.

2 The claims of several non-employees in *Alfaro* were remanded to state court and are not at issue on this appeal.

criminal prosecution. The same is true of Alfaro's claims for emotional distress; the employer's conduct is not outrageous just because a statutory prohibition may have been violated, rather it depends upon the relationship between the parties. Thus, we affirm both *Cramer* and *Alfaro*.

However, claims based upon retaliatory discharge in violation of public policy are different. Under California law, they turn on the employer's motivation—not the employees' expectations. Accordingly, we reverse *Hoffman*.

I

Consolidated Freightways is a large trucking company whose drivers and non-supervisory employees at the Mira Loma, California trucking terminal are subject to a collective bargaining agreement between Consolidated and the International Brotherhood of Teamsters, Local No. 63. Article 26, Section 2 of the Master Agreement provides that "[t]he Employer may not use video cameras to discipline or discharge an employee for reasons other than theft of property or dishonesty" and stipulates to a procedure to be followed if video tapes are used to support discipline or discharge. Other provisions acknowledge concern about substance abuse, prescribe drug testing procedures, and establish a process for grieving disputes arising under the agreement.

Evidently as part of an effort to detect and deter the use of drugs by its drivers, Consolidated installed video cameras and audio listening devices behind two-way mirrors in the restrooms at the Mira Loma terminal.[3] Employees discovered the surveillance equipment in September 1997.

Local 63 filed a grievance on September 22, 1997, and on September 27 Lloyd Cramer, a truck driver employed at the Mira Loma terminal, brought a class action in the Superior

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3 The parties appear to differ on whether the surveillance was entirely of the common areas, but the dispute is not material to our decision.

Court for the State of California in Riverside County alleging invasion of privacy on behalf of all "individuals lawfully on the premises * * * who had a reasonable expectation of privacy while using defendants' restrooms." Another suit was filed in state court by Guillermo Alfaro (joined by 281 others), seeking damages for invasion of privacy as well as for infliction of emotional distress, and an injunction to stop Consolidated's use of the allegedly illegal devices. Consolidated removed both actions to federal district court, asserting that the claims fall within the preemptive reach of § 301.

Consolidated moved in both actions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure; conversely, Alfaro filed a motion to remand for lack of federal jurisdiction, in which Cramer joined. Various motions were filed with respect to class certification in *Cramer*, but the district court considered the remand and dismissal motions first. The court denied the motions to remand; granted Consolidated's motion to dismiss in *Cramer* and denied the request for certification as moot; and granted the motion to dismiss in *Alfaro* as to the 273 employees and remanded the claims of nine non-employees to state court.

Meanwhile, Theresa Hoffman and Masao Shobe also filed an action in state court. Hoffman claimed that while at work, she witnessed installation of some of the surveillance devices and that she was fired as part of a cover-up. As a "casual employee" under the collective bargaining agreement, Shobe regularly worked short stints for Consolidated at the Mira Loma terminal. Although he was not working at the time, he joined as a party in the *Alfaro* action. Thereafter, Shobe applied to be rehired but alleges that he was rejected because of his participation in the *Alfaro* suit. Both claim that installation of the secret cameras violated California Penal Code §§ 632, 635, 647k and 653n as well as their constitutional rights of privacy under Article 1, Section 1 of the California Constitution, and that Consolidated's job actions were taken to conceal the existence of crimes in Hoffman's case, and in Shobe's, to punish him for filing a

lawsuit to protect and enforce his constitutional privacy rights. Consolidated removed and moved to dismiss on grounds of preemption; Hoffman and Shobe in turn sought a remand. The district court found both claims preempted, and dismissed the action.

All parties have timely appealed.

II

Invasion of Privacy
(Hoffman and *Alfaro)*

Cramer[4] and Alfaro argue that the LMRA cannot preempt a lawsuit by union employees who claim they are victims of illegal surveillance and eavesdropping activities by their employers. They point out that the LMRA only preempts state lawsuits which are "substantially dependent" on a CBA, *see Caterpillar, Inc.* v. *Williams*, 482 U.S. 386 (1987), and that employees covered by a collective bargaining agreement may assert legal rights "independent" of the agreement. *Id.* at 396. "Independent" means that "resolution of the state-law claim does not require construing the collective bargaining agreement." *See Lingle* v. *Norge Division of Magic Chef*, 486 U.S. 399, 407 (1988). Specifically relying on *Allis-Chalmers*, and *Miller* v. *AT&T Network Sys.*, 850 F.2d 543 (9th Cir. 1988), Cramer and Alfaro submit that their state law claims are independent of the CBA because the collective bargaining agreement cannot, as a matter of law, authorize conduct that is illegal under state law. In their view, Consolidated's conduct was illegal and prohibited by at least

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[4] Cramer preliminarily contends that federal jurisdiction cannot exist because his complaint does not mention an employer/employee relationship. However, these facts were evident in his request for class certification and were, in any event, properly before the court through Consolidated's petition for removal. *See Olguin* v. *Inspiration Cons. Copper* Co., 740 F.2d 1468, 1473 (9th Cir. 1984) (court may look beyond facts pleaded in complaint to ascertain facts that would appear in a "well pleaded" complaint), *overruled on other grounds, Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985).

four sections of the California Penal Code: § 653n,[5] which makes it a misdemeanor to install a two-way mirror in a bathroom; § 647(k),[6] which criminalizes viewing the interior of a bathroom; § 632,[7] which makes it illegal to eavesdrop by means of electronic recording devices; and § 635,[8] which prohibits the possession of eavesdropping devices. As there is no possible interpretation of the CBA that would allow the criminal surveillance at issue in this case, Cramer and Alfaro maintain there will be no need to interpret the collective bargaining agreement in the course of the litigation.

Consolidated counters that no matter how the employees' privacy claim is cast, it cannot be determined without interpretation and application of the collective bargaining agreement, which specifically addresses the use of video surveillance and drug interdiction, because the employees allege (and must prove) that they reasonably expected to be free from video surveillance and that the surveillance undertaken unreasonably intruded on their reasonable expectations of privacy. Consolidated further contends that

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5 Any person who installs or who maintains after April 1, 1970, any two-way mirror permitting observation of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or hotel room, is guilty of a misdemeanor. Cal. Penal Code § 653n.

6 Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: (K) Anyone who looks through a hole or opening, into, or otherwise views, by means of an instrumentality, including [a] * * * camera, * * * the interior of a bathroom * * * with the intent to invade the privacy of a person or persons inside. Cal. Penal Code § 647(k).

7 Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, * * * shall be punished * * *. Cal. Penal Code § 632(a).

8 Every person who manufactures, assembles, sells, offers for sale, advertises for sale, possesses, transports, imports, or furnishes to another any device which is primarily or exclusively designed or intended for eavesdropping upon the communication of another * * * shall be punished * * *. Cal. Penal Code § 635(a).

§ 301 preemption does not turn on whether a privacy claim is based upon an alleged violation of a criminal statute, a constitutional provision, or some other source of substantive rights under state law but instead, depends upon whether the state claim can be resolved without consideration of the collective bargaining agreement. Finally, it submits, the general proposition that parties to a collective bargaining agreement cannot agree to something illegal under state law is largely irrelevant in this case, where the critical issue is whether Consolidated's alleged violation invaded the employees' reasonable expectations of privacy.

We do not write on a clean slate in this area. It is by now well-settled that Section 301 preempts state law claims which are founded on rights created by a collective bargaining agreement, or which are "substantially dependent on analysis of a collective bargaining agreement." *Stikes* v. *Chevron U.S.A., Inc.*, 914 F.2d 1265, 1268 (9th Cir. 1990). More particularly, we have held in a long line of cases that employee suits for violation of privacy interests arising under California law are inextricably intertwined with the collective bargaining agreement. "This is because a violation of California's constitutional right to privacy requires both that an individual have a 'personal and objectively reasonable expectation of privacy' and that the expectation 'has been infringed by an unreasonable * * * intrusion.'" *Id.* at 1269 (quoting *Alarcon* v. *Murphy*, 248 Cal. Rptr. 26, 29 (Ct. App. 1988)). Thus, in *Stikes*, we confronted a union employee's claim for violation of his right to privacy on account of Chevron's policy requiring employees to submit to random searches of their persons and property. We concluded that the "district court could not ascertain Stikes' expectations of privacy at the workplace without considering the conditions of his employment enumerated in the collective bargaining agreement." *Id.* at 1269. Before that, in *Laws* v. *Calmat*, 852 F.2d 430, 431-32 (9th Cir. 1988), and *Utility Workers of America* v. *Southern California Edison Co.*, 852 F.2d 1083, 1085-87 (9th Cir. 1988), we held that state law privacy challenges to a union employer's drug and alcohol testing

programs are substantially dependent upon the collective bargaining agreement, whether or not specifically discussed in the agreement, because a drug or alcohol program is a working condition and the conditions of a union employee's employment are governed by the collective bargaining agreement. Most recently, we revisited whether claims for invasion of privacy rights arising out of an employer's drug testing program were preempted in *Schlacter-Jones* v. *General Telephone of California*, 936 F.2d 435 (9th Cir. 1991). Again holding they were, we reasoned that a collective bargaining agreement governs the working conditions of employment, a testing program is a working condition whether or not it is specifically discussed, and "[w]hen a working condition such as drug testing is subject to bargaining, and the employee's claim is rooted in the expectations of the parties, determining liability will necessarily involve contract interpretation and the claim will be preempted." *Id.* at 441.

Cramer and Alfaro contend that we need not follow this line of authority because restroom surveillance is different from drug testing in that drug testing is not illegal in California whereas it is illegal to install a two-way mirror in a bathroom. *See* Cal. Penal Code § 653n. We cannot agree. While the level of culpability and the consequences may be different, the claim for relief is not; here as in the random search and drug-testing cases, the employees complain of an invasion of privacy contrary to their rights under the California Constitution. As we recognized in *Stikes*, under California law plaintiffs asserting an invasion of privacy claim must show that they had a personal and objectively reasonable expectation of privacy that was infringed by an unreasonable intrusion. *Stikes*, 914 F.2d at 1269. This depends on the "deal struck between labor and management." *Schlacter-Jones*, 936 F.2d at 441. The reason is that consent is normally a defense to a privacy action.[9] As the California

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[9] Cal. Penal Code § 653n, upon which Cramer and Alfaro principally rely, does not provide a private cause of action for invasion of privacy.

Supreme Court articulated the point in *Hill* v. *National Collegiate Athletic Ass'n*, 26 Cal. Rptr. 2d 834, 849 (Cal. 1994):

> [T]he plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed "highly offensive to a reasonable person" so as to justify tort liability.
>
> Further, [i]n determining the " 'offensiveness' " of an invasion of a privacy interest, common law courts consider, among other things: "the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded."

Id. at 850 (quoting *Miller* v. *National Broadcasting* Co., 232 Cal. Rptr. 668, 679 (Ct. App. 1986)). Thus, in this case as in the case of employer search or drug testing programs that we have previously considered, the reasonableness of the employees' expectations of privacy will depend upon the level of management oversight allowed in the collective bargaining agreement and the extent to which this particular surveillance exceeds what Cramer and Alfaro could reasonably expect.[10]

Thus they must proceed on a general tort claim for invasion of privacy under the California Constitution, Article 1, Section 1. While civil remedies are provided for violations of Penal Code §§ 632 and 635, § 632 explicitly hinges on the absence of consent. Section 637.2, which provides the private cause of action for violations of Section 635, requires proof that the plaintiff was "injured" by the eavesdropping equipment, which in turn also depends on consent. *See* Cal. Penal Code § 632; *People* v. *Canard*, 65 Cal. Rptr. 15, 29 (Ct. App. 1967).

[10] Faced with a somewhat similar situation, where eight female workers complained they had been subjected to video surveillance in the

They argue that this cannot be so for several reasons directly related to the illegality of the surveillance activities. First, Cramer and Alfaro emphasize the Supreme Court's statement in *Allis-Chalmers* that "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers*, 471 U.S. at 212. They maintain that criminal conduct is, by definition, outrageous, *see Galvez* v. *Kuhn*, 933 F.2d 773, 780 (9th Cir. 1991), and cannot be a condition that it is possible for a collective bargaining agreement to condone. While the argument has considerable force, it ultimately fails to save their claim because the civil right to privacy, regardless of source, can be waived for the reasons we have already explained. As the Court went on to explain the difference between obligations that are "independent" of a labor contract from those that are not:

> In extending the preemptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.
>
> Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements.

Allis-Chalmers, 471 U.S. at 212-13 (footnote omitted). This is precisely the situation here, as privacy rights can be altered or waived under California law and must be considered in

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locker room in violation of their right to privacy, the Seventh Circuit deemed the action to arise under § 301 because the employer had a non-frivolous argument that this kind of surveillance was implicitly authorized by the management rights clause of the CBA. *See Brazinski* v. *Amoco Petroleum Additives Co.*, 6 F.3d 1176 (7th Cir. 1993), *earlier opinion*, *In re Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992). However, there is no indication that the surveillance AMOCO conducted was prohibited by the state's criminal laws, so it does not speak directly to the point before us.

context. *See Hill*, 26 Cal. Rptr. 2d at 850. No one suggests that the *subject* of surveillance is an improper subject for collective bargaining. *Cf. Utility Workers*, 852 F.2d at 1086 (noting that drug testing is proper subject for collective bargaining and does not implicate the sort of "nonnegotiable state-law rights" that *Allis-Chalmers* indicates might preclude preemption); *Schlacter-Jones*, 936 F.2d at 441 (noting that "the question is not solely whether a state law claim is '*nonnegotiable*'; it is whether it is '*independent*' of the collective bargaining agreement"). Thus, the extent to which the collective bargaining agreement and the relationship between the parties in the workplace allow for surveillance will inevitably inform the decision about how reasonable the employees' expectations were that it would not occur as it did.

Galvez represents quite a different situation. There, the employee sued for damages for an assault. Being assaulted by a supervisor is not only outrageous, it is non-waivable. Further, Galvez's claim could be resolved without interpreting the collective bargaining agreement because liability for the assault turned entirely on the employer's intent. Unlike these cases, the outcome in *Galvez* in no way depended on the reasonableness of the employee's expectations.

The same is true of other cases upon which Cramer and Alfaro rely. *Miller, Jimeno* v. *Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995), *Ramirez* v. *Fox Television Station, Inc.*, 998 F.2d 743 (9th Cir. 1993), and *Chmiel* v. *Beverly Wilshire Hotel Co.*, 873 F.2d 1283 (9th Cir. 1989), all involve claims by a union employee arising out of alleged discrimination by the employer contrary to state law. In this context we have held that when a state construes its discrimination statutes to rely on standards of discriminatory discharge that are independent of any standard of reasonable treatment set forth in the collective bargaining agreement, then termination of employment allegedly in violation of those statutory standards can be resolved under those standards without reference to the collective bargaining agreement. In other

words, a *Miller*-type case only raises a factual dispute under an established state standard; such cases can be fully determined by deciding if the employer intended to discriminate. Unlike these cases, the California "standard" for privacy assumes that it can be altered by agreement. Because it can be, it plainly is not a "nonnegotiable, independent state-law right" under *Allis-Chalmers*. As we recognized in *Miller*, "[t]he concept 'nonnegotiable' is clear. A right is nonnegotiable if the state law does not permit it to be waived, alienated, or altered by private agreement." *Miller*, 850 F.2d at 546. Given the negotiable right at issue here, there is no basis for concluding that a different analysis applies to a privacy claim founded on arguably illegal, by contrast with legal but also invasive, activities.

Next, Cramer and Alfaro submit that California Penal Code §§ 653n and 647(k) flatly ban surveillance through two-way mirrors in bathrooms regardless of whether there is an expectation of privacy. Whether or not this is so for purposes of criminal prosecution, there is no question that the civil tort on which they proceed in this case *does* turn on the existence of a reasonable expectation of privacy. Alternatively, they contend that California case law interpreting § 653n is clear that the expectation of privacy that people have in a restroom is reasonable as a matter of law. They point to *People* v. *Metcalf*, 98 Cal. Rptr. 925, 927 (Ct. App. 1971), in which the court held that "the enactment of [Penal Code] section 653n enunciates a public policy against clandestine observation of public restrooms and renders it reasonable for users thereof to expect that their privacy will not be surreptitiously violated," and to *People* v. *Triggs*, 106 Cal. Rptr. 408, 414 (Cal. 1973), *overruled on other grounds, People* v. *Lilienthal*, 150 Cal. Rptr. 910, 912 n.4 (Cal. 1978), and *Young* v. *Superior Court of Tulare County*, 129 Cal. Rptr. 422, 425 (Ct. App. 1976), which also indicate that the expectation of privacy a person has when he enters a restroom is reasonable. However, these are Fourth Amendment cases in which a person accused of criminal conduct occurring in a public restroom has challenged the

use of evidence obtained through surreptitious surveillance on the footing that it was an unreasonable search of an area in which he had a reasonable expectation of privacy. *See also In re Deborah C.*, 177 Cal. Rptr. 852, 858 (Cal. 1981) (prosecution for theft based on fitting room surveillance). We are aware of no California authority interpreting § 653n to apply to employees who are parties to a collective bargaining agreement, or applying the constitutional right of privacy in the context of surveillance other than in *Hill*. *Hill* expressly conditions the right to privacy on consent and circumstances. Accordingly, while § 653n undoubtedly accords with a person's reasonable expectations of privacy in general—and probably with the expectations of Consolidated's employees—we cannot say that it absolutely does without examining the extent to which surveillance, which the collective bargaining agreement assumes will occur, is conducted at the terminal with the employees' knowledge and consent.

Additionally, Cramer and Alfaro argue that their actions are not preempted under the test for preemption we adopted in *Miller* and applied in *Jimeno*. In deciding whether Miller's discrimination claim was preempted we considered

> (1) whether the CBA contains provisions that govern the actions giving rise to a state claim, and if so, (2) whether the state has articulated a standard sufficiently clear that the state claim can be evaluated without considering the overlapping provisions of the CBA, and (3) whether the state has shown an intent not to allow its prohibition to be altered or removed by private contract.

Miller, 850 F.2d at 548 (footnote omitted). For reasons we have already discussed, none of these factors cuts in favor of non-preemption of a privacy claim.

Finally, Cramer and Alfaro suggest that we should not hold their claims preempted because to do so would give employers license to violate the criminal laws without recourse. We fail to see how, as employers can be criminally

prosecuted for violations of § 653n, and will surely lose in the grievance process itself if, as the employees here contend, surveillance has in fact been conducted without authority. Our decision in no way sanctions what Consolidated did; it merely prescribes the forum and the form in which the dispute must go forward. Accordingly, the privacy claims are preempted, and were properly dismissed.

III

Emotional Distress
(Alfaro)

Alfaro asserts additional causes of action for the intentional and negligent infliction of emotional distress. In effect these are "parasite" claims that track the principal claim for invasion of privacy. We therefore address them summarily, as for essentially the same reasons, they, too, are preempted.

To demonstrate intentional infliction of emotional distress, a plaintiff must show that the conduct was "extreme and outrageous," *Sabow* v. *United States*, 93 F.3d 1445, 1454 (9th Cir. 1996) (applying California law), " 'exceed[ing] all bounds of that usually tolerated in civilized society.' " *Id.* at 1455 (quoting *Davidson* v. *Westminster*, 185 Cal. Rptr. 252, 259 (Cal. 1982)). Whether the employees consented to surveillance affects the extent to which the surveillance about which Alfaro complains is "outrageous." *See Saridakis* v. *United Airlines*, 166 F.3d 1272, 1278 (9th Cir. 1999) (under California law "determining whether an employer's conduct is outrageous requires an interpretation of the terms of the CBA * * * "); *see also Miller*, 850 F.2d at 551 (construing Oregon law, but noting that outrageousness could depend upon the collective bargaining agreement and that "we cannot assume that the employer's behavior was outrageous for purposes of an emotional distress claim just because the employer may have violated a statutory prohibition against discrimination").

The tort of negligent infliction of emotional distress is simply a negligence claim alleging that the defendant

breached a duty to protect the plaintiff's mental well-being. *See Potter* v. *Firestone Tire & Rubber Co.*, 25 Cal. Rptr. 2d 550, 562 (Cal. 1993) ("[T]here is no independent tort of negligent infliction of emotional distress"); *Burgess* v. *Superior Court*, 9 Cal. Rptr. 2d 615, 618 (Cal. 1992) ("We have repeatedly recognized the *negligent* causing of emotional distress is not an independent tort, but the tort of *negligence*.") (internal quotations and alterations omitted). For the same reason that resort to the collective bargaining agreement is required to adjudicate Alfaro's claim for intentional infliction of emotional distress, it is necessary to resolve the negligence claim: the extent to which the employees consented to surveillance is a factor in determining whether Consolidated had a duty not to be surveillant in the restrooms. Alfaro argues that we have repeatedly held that outrageous and illegal conduct is outside the terms of a collective bargaining agreement, citing *Galvez* as an example. However, as we have discussed, an assault such as happened in *Galvez is* neither more nor less outrageous depending upon the conditions governing conduct in the workplace, whereas the outrageousness of the conduct here does depend on the degree of surveillance contemplated through the collective bargaining agreement.

Accordingly, Alfaro's claims for emotional distress are preempted.[11]

IV

Discharge in Violation of Public Policy (Hoffman)

The gist of Hoffman's claim is that she was preemptively fired in an attempt to keep her from reporting illegal

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[11] Although Alfaro appears also to allege causes of action for violation of Cal. Penal Code § 635, which criminalizes the possession of eavesdropping equipment, and Cal. Penal Code § 632, which prohibits eavesdropping on confidential communications, he does not argue these claims separately. We therefore deem them abandoned on appeal but note that, in any event, consent is a defense.

surveillance activity to law enforcement officials. Her theory is that whistleblowers are protected from retaliation by statute in California, *see* Cal. Labor Code § 1102.5(b),[12] and that California courts have held that terminations in violation of § 1102.5 give rise to a cause of action for wrongful termination in violation of public policy. *See, e.g., Garcia* v. *Rockwell Int'l*, 232 Cal. Rptr. 490 (Ct. App. 1986) (public policy forbids retaliation by employer against employee who disclosed information regarding employer's violation of law to government agency), *abrogated on other grounds, Gantt* v. *Sentry Ins.*, 4 Cal. Rptr. 2d 874 (Cal. 1992). She points out that the conduct she witnessed is criminalized by Cal. Penal Code §§ 653n, 647(k), 632, and 635, and that privacy is explicitly protected in the California Constitution. Shobe rests his claim that he was not rehired in retaliation for being a party in the *Alfaro* litigation on the right to bring a lawsuit alleging violation of his privacy rights. Both argue that it will be unnecessary to interpret the collective bargaining agreement because the issue of whether Consolidated fired Hoffman to cover-up its criminal acts, and refused to rehire Shobe because of his legal action, is strictly a factual inquiry under state law.

Consolidated's position is that because an essential element of all "public policy" wrongful termination claims is that the employer's conduct must have violated some fundamental public policy, and the violation upon which Hoffman and Shobe rely is the alleged invasion of their privacy rights, they must establish that Consolidated in fact violated the statutory or constitutional provisions protecting the right to privacy. This Consolidated believes they cannot do without interpreting the collective bargaining agreement. If this were

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12 Section 1102.5(b) provides:

> No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute. Cal. Labor Code § 1102.5(b).

the issue—that is, if the claim could be made out only if the employees first prove that Consolidated in fact violated their privacy rights—then this case would be exactly like *Cramer* and *Alfaro*. However, the focus here is different: "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." *Green* v. *Ralee Engineering Co.*, 78 Cal. Rptr. 2d 16, 29 (Cal. 1998). Put another way, Hoffman and Shobe do not need to show that their own privacy rights were actually violated (which would depend upon the reasonableness of their expectations), rather that their claim for retaliatory wrongful termination is predicated on important public policy—which they allege is privacy.

Under California law, "[a]part from the terms of an express or implied employment contract, an employer has no right to terminate employment for a reason that contravenes fundamental public policy as expressed in a constitutional or statutory provision." *Turner* v. *Anheuser-Busch, Inc.*, 32 Cal. Rptr. 2d 223, 231 (Cal. 1994). To state a cause of action for wrongful discharge in violation of fundamental public policy, an employee must prove that his dismissal violated a policy that is fundamental, beneficial for the public, and embodied in statute or constitutional provision. "Tort claims for wrongful discharge typically arise when an employer retaliates against an employee for '(1) refusing to violate a statute * * * [,] (2) performing a statutory obligation * * * [,] (3) exercising a statutory right or privilege * * * [, or] (4) reporting an alleged violation of a statute of public importance." *Id.* at 234 (quoting *Gantt* v. *Sentry Ins.*, 4 Cal. Rptr. 2d 874 (Cal. 1992)). Thus the cause of action turns on why the employer took the action it did, and the existence of a source of public policy to which the employee's claim is "tethered." *Gantt*, 4 Cal. Rptr. 2d at 881.

Consolidated argues that public policy wrongful discharge claims must be based upon a fundamental policy that is not subject to revision through agreement of private parties (as

privacy rights are), *see Green*, 78 Cal. Rptr. 2d at 21 (discussing genesis of requirement that *Tameny*[13] claim implicate public policy); and that there can be no viable public policy claim based upon privacy rights because they may be altered by agreement. However, it seems to us that both points have to do with whether a viable cause of action is stated under California law, which is an issue that the federal courts cannot reach without jurisdiction.[14] The only question for us to decide is whether the collective bargaining agreement will have to be construed in the course of litigating this action. We think not, for if Consolidated is correct that a public policy which can be altered by agreement is not the kind of public policy upon which a wrongful discharge claim may be based, a state court can make that determination with respect to California's policy on privacy simply by looking to state law. Thus, Consolidated's reliance on *Stikes*, *Laws*, *Utility Workers*, and *Schlacter-Jones*, each of which involves a job action taken as a result of a search that the employee later contends invaded his privacy rights, is misplaced. Instead, this case is closer to *Lingle*, where an employee covered under a collective bargaining agreement brought an action for retaliatory discharge for filing a workers' compensation claim, and the Court held that the state claims were not preempted because their resolution turns on the employer's motivation in discharging the employee—not on interpretation of the agreement. *Lingle*, 486 U.S. at 407.

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[13] *Tameny* v. *Atlantic Richfield Co.*, 164 Cal. Rptr. 839 (Cal. 1980) (holding that at-will employees may recover tort damages from employers if they can show they were discharged in contravention of fundamental public policy).

[14] The same is true of Consolidated's further argument that Hoffman's reliance on § 1102.5 of the Labor Code is misplaced. Whether it is or isn't is a question that goes to the merits (or lack thereof) of her claim, not to whether interpretation of the collective bargaining agreement is required.

In sum, whereas the claims for invasion of privacy in *Cramer* and *Alfaro* rest on the expectations of the parties, the *Hoffman* claims for retaliatory wrongful discharge rest on Consolidated's motivation in firing Hoffman and not rehiring Shobe. *See Schlacter-Jones*, 936 F.2d at 441 (contrasting a *Lingle* claim that centers on the motivation of the employer with a privacy claim which rests "primarily on the expectations of the parties and the powers" of the employer). This can be determined without reference to the collective bargaining agreement. Accordingly, neither Hoffman's nor Shobe's claim is preempted. We therefore reverse dismissal and remand with instructions for *Hoffman* to be remanded to the Superior Court for Riverside County.

AFFIRMED as to *Cramer* and *Alfaro*; REVERSED AND REMANDED as to *Hoffman*.

FISHER, Circuit Judge, dissenting in part:

> There was * * * no way of knowing whether you were being watched at any given moment * * *. It was even conceivable that they watched everybody all the time * * *. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.

George Orwell, *1984* 6-7 (Signet Classic 1992) (1949).

In this era of diminished privacy, where television transforms to reality what used to be considered fiction, *see, e.g.*, Edmund L. Andrews, *Europe's 'Reality' TV: Chains and Big Brother*, N.Y. Times, April 11, 2000, at A4 (describing a television game show called "Big Brother" for which contestants "are sealed for 100 days in a house where cameras and microphones record them 24 hours a day"), perhaps one should not be troubled by the blatant invasion of privacy at issue in this case. But I simply cannot agree that federal labor law intends to preempt states from protecting their citizens—even those working under collective bargaining agreements—from the kind of bathroom spying

secretly and unilaterally employed by Consolidated Freightways, Inc.

Consolidated's clandestine surveillance of its employees and others using cameras hidden behind two-way mirrors was criminal conduct, in clear violation of California law. The California Penal Code unambiguously prohibits installing two-way mirrors in restrooms, *see* Cal. Penal Code § 653n, and bars using a camera to look through a hole or opening into a restroom, *see id.* § 647(k)(1). Although the majority describes Consolidated's conduct as "arguably criminal in California," Maj. op. at 1126, there is nothing "arguable" about the criminal nature and impropriety of Consolidated's actions.

The Supreme Court has explicitly stated that: "Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 212 (1985). Nevertheless, the majority finds all of the *Cramer* and *Alfaro* plaintiffs' claims to be preempted by § 301, even though (1) the collective bargaining agreement ("CBA") in question does not discuss—even implicitly—surreptitious surveillance of restrooms[1] and (2) if the CBA did contain such provisions, those provisions would be void as violations of California criminal law, *see* 1 B.E. Witkin, Summary of California Law, Contracts §§ 430-31, at 386-88 (9th ed. 1987). In my view, it defies logic to suggest that a court must interpret a CBA to determine whether the parties' agreement permits illegal conduct. Therefore, I respectfully dissent from Parts II and III of the majority opinion to the extent the majority finds the plaintiffs' claims to be completely preempted.

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[1] The CBA provision relied upon by Consolidated to support preemption is entitled "Use of Video Cameras for Discipline and Discharge." Although this provision implicitly suggests that videotaping might occur, it does not discuss or permit the use of *surreptitious* video surveillance techniques, much less the use of two-way mirrors to accomplish such surveillance.

* * * * * *

Preemption of an employee's state tort claim turns on whether that claim "confers *nonnegotiable* state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contracts." *Allis-Chalmers*, 471 U.S. at 213 (emphasis added). The majority quotes *Miller* v. *AT&T Network Systems*, 850 F.2d 543, 546 (9th Cir. 1988), for the proposition that "[a] right is nonnegotiable if the state law does not permit it to be waived, alienated, or altered by private agreement." Maj. op. at 1132 (internal quotation marks omitted).

The majority then finds that "[g]iven the negotiable right at issue here, there is no basis for concluding that a different analysis applies to a privacy claim founded on arguably illegal, by contrast with legal but also invasive, activities." *Id.* The majority's conclusion that the plaintiffs' right to be free from two-way mirror observation was "negotiable" (and, therefore, that there is no principled basis upon which to distinguish such claims based on illegal conduct from those in which the conduct is less offensive) lies at the heart of my disagreement with its analysis.

It is true that we generally regard California privacy claims as involving negotiable rights that are subject to § 301 preemption. *See, e.g., Stikes* v. *Chevron USA, Inc.*, 914 F.2d 1265, 1270 (9th Cir. 1990). As the majority suggests, this is because "consent is *normally* a defense to a privacy action." Maj. op. at 1130 (emphasis added). However, I do not believe this general rule supports the majority's conclusion that privacy claims must *always* be preempted.

The various privacy cases cited by the majority are not only distinguishable, they also do not stand for the proposition that every privacy claim will be preempted by § 301. Most of the cases relied upon by the majority involve an employer's right to institute mandatory drug testing in the

workplace. *See Schlacter-Jones* v. *General Tel.*, 936 F.2d 435, 437 (9th Cir. 1991) (employee terminated following positive drug test); *Laws* v. *Calmat*, 852 F.2d 430, 433 (9th Cir. 1988) (employee suspended for refusing to submit to a urine test); *Utility Workers of Am.* v. *Southern Cal. Edison Co.*, 852 F.2d 1083, 1085 (9th Cir. 1988) (challenge to employer's institution of random drug testing program under which employees receive one day's notice of selection for testing). Our decisions in these cases were based on an underlying determination that "an employee's right to be free from mandatory drug testing is properly a subject of collective bargaining," *Schlacter-Jones*, 936 F.2d at 442, rather than on a blanket rule that all privacy claims necessarily require interpretation of a CBA. As we noted recently in *Balcorta* v. *Twentieth Century-Fox Film Corp.*,— F.3d—, 2000 WL 350562 (9th Cir. 2000):

> Dicta from a few of our earlier complete preemption cases suggested that the doctrine extends much further than the "interpretation" test allows. In a few cases dealing with state constitutional privacy claims, we suggested that any claim that is "a properly negotiable subject for purposes of collective bargaining" is completely preempted. More recently, however, we have made it clear that the outcome in those cases did not turn on the expansive dicta about complete preemption * * *. [B]oth the Supreme Court and this court have rejected the broad swath of complete preemption that the dicta in *Laws* and *Utility Workers of America* would suggest. *Id.* at—n.10 (quoting *Utility Workers of Am.*, 852 F.2d at 1086) (citations omitted). Unlike the conduct at issue here, drug testing is neither surreptitious activity on the part of an employer nor illegal under state law; therefore, as *Balcorta* suggests, there is no reason for us to bind ourselves to the expansive language of our previous drug testing cases when, as here, it is inappropriate to do so.

The majority's reliance on California state court precedent to support its broad holding is also misplaced. *Hill* v. *National Collegiate Athletic Association*, 26 Cal. Rptr. 2d

834 (Cal. 1994), was written in the context of drug testing of college athletes, whose activities by their nature "involve[ ] close regulation and scrutiny of [their] physical fitness and bodily condition," and who regularly undergo physical examinations, including urinalysis, and "frequently disrobe in the presence of one another * * * in locker room settings where private bodily parts are readily observable by others of the same sex." *Id.* at 860.[2] The court also emphasized the openness and consensual nature of the testing. *See id.* "Thus, athletes have complete information regarding the NCAA's drug testing program and are afforded the opportunity to consent or refuse before they may be selected for testing."[3] *Id.* at 860-61.

Nothing in *Hill* suggests that someone who is *surreptitiously* spied upon in a bathroom by *criminal* means has anything other than a reasonable expectation of privacy as a matter of law. *Hill* simply does not create the blanket rule inferred by the majority, *see* Maj. op. at 1132 ("*Hill* expressly conditions the right to privacy on consent , and circumstances."), or stand for the proposition that, regardless of the context or the nature of the "surveillance" in a particular case, consent is always a question of fact (thereby requiring interpretation of a CBA, if one exists). Quite the contrary: the supreme court explained that "[w]hether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court," and the availability of consent as a defense will turn on whether it is "appropriate in view of the nature of the claim and the relief requested." *Hill*, 26 Cal. Rptr. 2d at 859. Significantly, the court noted that the *Hill* plaintiffs had not contended that the

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[2] Presumably, Consolidated's bathroom videotapes were viewable by anyone, regardless of the sex of the viewer or the viewed.

[3] Here, the plaintiffs were never told about the hidden cameras or two-way mirrors, and were never given the opportunity to consent to bathroom surveillance. At most, they knew some kind of legal video surveillance might occur.

NCAA's conduct was "contrary to law or public policy." *Id.* at 861.

In contrast to the conduct at issue in *Hill*, the California Supreme Court has described § 653n as "express[ing] a legislative policy against 'clandestine observation of public restrooms,' rendering it 'reasonable for users thereof to expect that their privacy will not be surreptitiously violated.'" *In re Deborah C.*, 177 Cal. Rptr. 852, 858 n.9, (Cal. 1981) (quoting *People* v. *Metcalf*, 98 Cal. Rptr. 925, 927 (Ct. App. 1971)). I do not believe the California Supreme Court, under the reasoning of *Hill* or otherwise, has precluded this court from concluding on the facts presented here that the plaintiffs as a matter of law had a reasonable expectation of privacy—that they would not be videotaped in Consolidated's restrooms through two-way mirrors—and to that extent their privacy claims are not preempted by § 301.[4]

I also disagree with the majority's analysis of *Alfaro*'s emotional distress claims. This court's preemption decisions do not establish a per se rule that such claims must be preempted by § 301. *Compare Saridakis* v. *United Airlines*, 166 F.3d 1272, 1278 (9th Cir. 1999) (claim of emotional distress resulting from mandatory drug testing is preempted), with *Galvez* v. *Kuhn*, 933 F.2d 773, 779-80 (9th Cir. 1991) (claim of emotional distress resulting from assault not preempted because "[c]ompliance with the CBA * * * cannot temper the potential outrageousness of the conduct"). *Miller*, upon which the majority relies, discussed how the factual

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[4] Justice George's separate concurrence and dissent strongly supports this conclusion:

> [E]ven if an employer discloses before hiring an employee that it intends to engage in visual surveillance of the employee restrooms and requires all employees to consent to such surveillance as a condition of employment, a state constitutional privacy challenge to such conduct would not necessarily founder on the ground that, in view of the explicit warnings and consent, the employees had no reasonable expectation of privacy.

Hill, 26 Cal. Rptr. 2d at 878 (George, J., concurring and dissenting).

distinctions underlying such claims can affect preemption analysis:

> [Emotional distress] claims may not be preempted if the particular offending behavior has been explicitly prohibited by mandatory statute or judicial decree, and the state holds violation of that rule in all circumstances sufficiently outrageous to support an emotional distress claim. For example, if a plaintiff alleges that an employer's criminal behavior inflicted extreme emotional distress, the emotional distress claim need not be preempted. The behavior could be found sufficiently outrageous to permit recovery without regard to whether the behavior might be permitted under the CBA. *Its outrageousness would be clear from the state's decision to make the behavior criminal. Miller*, 850 F.2d at 550 n.5 (emphasis added).

This case is analogous to *Galvez* v. *Kuhn*, in which we held that an employee's claim for intentional infliction of emotional distress was not preempted by § 301. Applying the reasoning set forth in *Miller* and *Allis-Chalmers, Galvez* examined the nature of the conduct underlying the employee's basic tort claim, rather than just the claim itself. *See id.* at 779. In particular, we noted in *Galvez* that "appellees' alleged assault and battery is made criminal by state law." *Id.* at 780.

Thus, the majority's restrictive consideration of just the basic tort claims alleged by the plaintiffs is erroneous. I believe we must also look to the specific conduct underlying each tort claim (in this case, installation of two-way mirrors in restrooms and the use of cameras to view the restrooms through holes hidden behind those mirrors) to determine whether that conduct affects our analysis.

To do so is consistent with Supreme Court precedent, which supports the proposition that § 301 does not preempt claims based on conduct that is per se illegal under state law. *See Allis-Chalmers*, 471 U.S. at 212 ("Clearly, § 301 does

not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law."). The majority does not adequately explain how its holding can be reconciled with *Allis-Chalmers*. Contrary to the majority's suggestion, the facts of this case are not "precisely the situation" that the Court described as being subject to preemption in *Allis-Chalmers*, Maj. op. at 1131; rather, as the language quoted above makes clear, this case involves the very situation the Court believed would *not* be preempted.

The majority recognizes that the plaintiffs' argument, grounded as it is in *Allis-Chalmers* and *Galvez*, has "considerable force," but concludes that this case is distinguishable. Maj. op. at 1131-32. In the majority's view, the emotional distress claim in *Galvez* was based on conduct that "is neither more nor less outrageous depending upon the conditions governing conduct in the workplace" while the same claim in this case "depend[s] on the degree of surveillance contemplated [by the CBA]." Maj. op. at 1133.

I disagree. Such a distinction cannot be supported by precedent or the facts of this case.

In particular, I find unpersuasive the majority's argument that the plaintiffs' claims, which are in part based on conduct that is per se illegal (in other words, not subject to waiver by consent or otherwise by the citizens of California), are completely preempted because "[n]o one suggests that the *subject* of surveillance is an improper subject for collective bargaining." *Id.* at 1131. The majority paints with too broad a brush. *Cf. Balcorta*, 209 F.3d at 1130 n.10 (noting that a claim is not preempted simply because the subject of the claim is appropriate for negotiation). Comparison to the underlying facts in *Galvez is* instructive. Galvez's alleged assault occurred when his foreman sped up a conveyor, thereby forcing Galvez to attempt to remove and stack the cartons on the conveyor belt at a rate that resulted in injury. *Galvez*, 933 F.2d at 774-75. In *Galvez*, therefore, we could have concluded that the claim for emotional distress was preempted because workplace safety and operating

procedures are both proper subjects for collective bargaining. We did not reach that conclusion because the particular conduct at issue was *criminal in nature* and was not a proper subject for collective bargaining. Likewise, although it is certainly true that surveillance is a common, appropriate subject for collective bargaining, the illegal, clandestine surveillance of restrooms through holes hidden behind two-way mirrors is most definitely not. This is true even if such surveillance is conducted for the laudable purpose of deterring and detecting drug use by truck drivers; regardless of Consolidated's objective, the means utilized by the company were illegal.

For these reasons, I would hold that the plaintiffs' privacy and emotional distress claims are not preempted by § 301, to the extent those claims stem from Consolidated's criminal use of hidden cameras and two-way mirrors to observe its employees in restrooms.[5] I respectfully dissent from the portions of the majority's opinion, set forth in Parts II and III, that establish that California tort claims are preempted by § 301 of the LMRA *even if the State of California deems the underlying conduct to constitute criminal activity.* As the

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[5] The plaintiffs' privacy and emotional distress claims could proceed under §§ 647k and 653n even though the other bases of their claims are preempted. *Cf. Milne Employees Ass'n* v. *Sun Carriers, Inc.*, 960 F.2d 1401, 1413 (9th Cir. 1991) (finding that a portion of a claim was not preempted even though the remainder of the claim was preempted); *Perugini* v. *Safeway Stores, Inc.*, 935 F.2d 1083, 1088 (9th Cir. 1991) (applying preemption analysis to distinctive "segments" of the same claim and reaching different conclusions as to each segment).

Supreme Court explained in *Allis-Chalmers*, "it would be inconsistent with congressional intent under [§ 301] to preempt state rules that proscribe conduct * * * independent of a labor contract." *Allis-Chalmers*, 471 U.S. at 212. I would take heed of the Court's observation, thereby avoiding the unfortunate result of the majority's opinion: unnecessary and improper interference with a state's ability to define the contours of its criminal laws and to protect its citizens from violations of those laws.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV97-7860-IH

LLOYD W. CRAMER, ET AL.,

Plaintiffs,

v.

CONSOLIDATED FREIGHT WAYS, INC.,

Defendant.

Filed February 24, 1998

ORDER DENYING PLAINTIFFS' MOTION TO REMAND; ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; AND JUDGMENT

There came before the Court for hearing on February 12, 1998, the following motions:

1. Plaintiffs' motion filed November 19, 1997, to remand the action to the state court from which it was removed. A similar motion to remand was also before the Court on the same day brought by plaintiffs in the companion case of *Alfaro* v. *Consolidated Freightways*, CV97-7861-IH. Although plaintiffs in the instant case, CV97-7860-IH did not

separately brief their motion to remand but adopted the motion to remand filed by plaintiffs in the companion case, the Court treated the motions to remand separately and this order deals only with plaintiffs' motion to remand in case CV97-7860-IH.

2. Defendant's motion to dismiss the action filed October 30, 1997.

3. Defendant's motion filed October 30, 1997 to stay discovery and the certification of the class.

Since similar motions in both cases were argued at the same time, the Court lists below all appearances in both cases.

In case CV97-7860-IH, for plaintiffs, Horton, Barbaro & Reilly by William O. Humprehys, Esq. (argued) and Malena R. LeClair, Esq.; and for defendant, Jeffer, Mangels, Butler & Marmaro by Louise Ann Fernandez, Esq. (argued) and Robert E. Mangels, Esq.

In case CV97-7861-IH, for plaintiffs, Myers & Pollard by Matthew L. Taylor, Esq. (argued) and Christine Pollard, Esq.; and for defendant, Jeffer, Mangels, Butler & Marmaro by Louise Ann Fernandez, Esq. (argued) and Robert Mangels, Esq.

As to case CV97-7860-IH only, the Court, having considered the said motions, together with the evidence, points and authorities and other documents filed in support thereof and having heard argument, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiffs' motion to remand is denied.

2. Defendant's motion to dismiss the action is granted. Plaintiffs shall take nothing by their complaint. Defendant shall have judgment against plaintiffs with costs of $_____.

3. Defendant's motion to stay discovery, etc., is deemed off calendar as moot.

4. A transcript of the proceedings in open court on February 12, 1998, is ORDERED filed when produced. It is incorporated herein by reference as the Court's findings of fact and conclusions of law and a statement of the Court's reasons.

5. The Clerk shall transmit a copy of this order by U.S. mail to all counsel of record.

DATED: February 24, 1998.

/s/ Irving Hill
IRVING HILL, Judge
United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV - 98 - 331 - LHM (Anx)

GUILLERMO ALFARO, ET AL.,

Plaintiffs,

v.

CONSOLIDATED FREIGHTWAYS, ET AL.,

Defendants.

April 24, 1998

CIVIL MINUTES - GENERAL

Present: Linda H. McLaughlin, Judge, Debra Beard, Deputy Clerk

PROCEEDINGS: ORDER RE 1) DISMISSAL OF CLAIMS ALLEGED BY 273 CONSOLIDATED EMPLOYEE PLAINTIFFS, AND 2) REMAND OF CLAIMS ALLEGED BY REMAINING NINE PLAINTIFFS.

IN CHAMBERS:

(1) This case, formerly Case No. 97-CV-7861-IH, was transferred to this Court on 3/31/98. The Court has reviewed and considered all the pleadings and motions filed in this case, as well as the minute orders entered by the former presiding Judge. The Court has also reviewed the file in *Lloyd Cramer, et al.* v. *Consolidated Freightways, Inc., et al.*, Case No. 97-CV-7860-IH (the "*Cramer* case").

(2) In the instant case, several hundred plaintiffs originally filed suit in Riverside County Superior Court alleging invasion of their privacy rights and other causes of action arising out of Defendants' placement of surveillance cameras in the restrooms at defendant Consolidated Freightway, Inc.'s ("Consolidated") Mira Loma Terminal. Plaintiffs allege causes of action for invasion of privacy, violation of Penal Code Sections 632 and 635, injunctive relief, and intentional and negligent infliction of emotional distress.

(3) *Motion to Dismiss and Motion to Remand.* Plaintiffs filed a Motion to Remand the case to Riverside County Superior Court, and Consolidated filed a Motion to Dismiss. The late Judge Irving Hill, who had presided over this case, ordered briefing and on 2/12/98 held a lengthy hearing to consider both motions.[1] After reviewing the papers submitted by each side and hearing the parties present their arguments, Judge Hill dismissed this action as to any named plaintiff who was an employee of Consolidated during the time surveillance cameras were installed and operating in the Mira Loma Terminal's restrooms. (*See* Reporter's Transcript of February 12, 1998 hearing, p.40.) Judge Hill determined that (1) the claims of employee plaintiffs were preempted by the collective bargaining agreement ("CBA") governing the

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[1] Judge Hill consolidated this case with the *Cramer* case for the purpose of considering Motions to Remand and Motions to Dismiss which had been filed in both cases. The Court need not, and does not, address Judge Hill's rulings in the *Cramer* case since judgment was entered therein on 2/25/98 and Plaintiffs filed their Notice of Appeal on 3/25/98.

terms and conditions of said plaintiffs' employment, and (2) arbitration was plaintiffs' exclusive remedy for resolving disputes arising under the CBA. (*Id.*) Judge Hill held off issuing a final judgment at the 2/12/98 hearing because plaintiffs alleged that as many as nine of the named plaintiffs were not Consolidated employees during the time the surveillance cameras were installed and operating in the Terminal. (*Id.* at p.41.) Since Judge Hill concluded that the claims of plaintiffs who had not been Consolidated employees should be remanded to state court rather than dismissed, he ordered the parties to identify, if possible, those plaintiffs whose claims should be severed and remanded to state court. (*Id.* at pp. 48-49.)

(4) The record in this case contains briefing and exhibits offered by both plaintiffs and Consolidated in their respective efforts to prove that the claims of nine of the 282 plaintiffs should either be remanded or dismissed.[2]

(5) The Court concurs with Judge Hill's reasoning summarized above, and agrees that dismissal of the claims of the 273 named plaintiffs who are Consolidated employees is appropriate. As to the remaining nine plaintiffs alleged not to be Consolidated employees during the installation and operation of the surveillance cameras, the parties agree that five plaintiffs, Victor Garcia, Danielle McCarthy, Matt Mulhern, Darla Thomas, and Anjie Walker, have never been Consolidated employees. (Objections, p.2.) The Court, therefore, remands their claims.

(6) There remains only the question of whether the claims of four plaintiffs, former employees Guillermo Alfaro, Steve Bugarian, David Fitzhugh, and Ignacio Lawton should

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[2] Plaintiffs first filed the names and social security numbers of the nine plaintiffs at issue. Consolidated responded by (1) stipulating to remand the claims of five of the plaintiffs, but (2) objecting to remand the claims of the other four. Plaintiffs filed a Reply to Consolidated's Objections, and Consolidated filed a Supplemental Response to Plaintiffs' Reply.

be remanded or dismissed. Consolidated removed this case in the first instance alleging that plaintiffs' claims were preempted by Section 301 of the LMRA, thus conferring subject matter jurisdiction on this Court. The burden of establishing federal jurisdiction is upon the party seeking removal. *Emrich* v. *Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988). All doubts as to removability are resolved in favor of remanding the case to the state court. *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941); *Gaus* v. *Miles. Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). In this instance, both plaintiffs and Consolidated have presented evidence in support of their respective positions. However, Consolidated has not proved conclusively that the claims of these four remaining plaintiffs arose while the CBA governed the terms and conditions of their employment. Consolidated has not, therefore, proved that their claims are preempted by Section 301 of the LMRA. As the removing party, Consolidated bears the burden of proving subject matter jurisdiction. Because it has failed to carry that burden, the Court remands the claims of the remaining four plaintiffs as well.

(7) *Ruling*. The claims of the 273 named plaintiffs who are employees of Consolidated are dismissed. The claims of the remaining nine plaintiffs, identified in paragraphs 5 and 6 above, are remanded to Riverside County Superior Court. Formal order accompanies this minute order.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. SACV 98 - 331 - LHM (Anx)

GUILLERMO ALFARO, ET AL.,

Plaintiffs,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION, ET AL.,

Defendants.

Filed April 27, 1998

ORDER RE:
1) DISMISSAL OF CLAIMS OF 273 PLAINTIFFS WHO ARE CONSOLIDATED FREIGHTWAYS EMPLOYEES;
2) REMAND OF CLAIMS OF REMAINING NINE PLAINTIFFS.

Based upon the reasons set forth in the Court's Minute Order dated 4/24/98, which is incorporated herein;

IT IS ORDERED that the claims of the 273 named Plaintiffs who are employees of Defendant Consolidated Freightways, Inc. be dismissed, and the claims of the

remaining nine Plaintiffs be remanded to the Superior Court for the County of Riverside, State of California.

DATED: 4/27/98

/s/ McLaughlin
LINDA H. McLAUGHLIN
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 13 2001
CLERK

No. 01-432

IN THE

Supreme Court of the United States

CONSOLIDATED FREIGHTWAYS, INC., *et al.*,

Petitioners,

v.

LLOYD W. CRAMER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents submit that the real issues for review are as follows:

1. Whether the 10-1 decision by the *en banc* panel of the Ninth Circuit Court of Appeals correctly held that the federal Labor Management Relations Act, 29 U.S.C. § 185, does not preempt state lawsuits by union employees seeking damages and injunctive relief arising from their employer's illegal use of hidden surveillance and eavesdropping devices in employee restrooms, when such conduct clearly violates no fewer than four state criminal statutes?

2. Can a collective bargaining agreement be interpreted to allow conduct by an employer that violates independent state criminal law?

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Respondents in *Cramer v. Consolidated Freightways* and *Alfaro v. Consolidated Freightways* submit the following **joint** Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner Consolidated Freightways.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Consolidated Freightways seeks to hide behind the shield of federal preemption to escape liability for its corporate criminal acts. Petitioner's brief incorporates virtually the same arguments it attempted to unsuccessfully advance in the Ninth Circuit Court of Appeals. The *en banc* panel of the Court of Appeals rejected those arguments in a 10-1 decision, and numerous other circuits of the Court of Appeals have rejected similar arguments in other cases. This Court should reject those arguments as well, and it should deny the instant Petition for Writ of Certiorari. (All references by Respondents in this Opposition Brief will be to those contained in Petitioner's Appendix).

Petitioner Consolidated Freightways ("Petitioner" or "Consolidated Freightways") installed hidden, illegal surveillance and eavesdropping devices in restrooms at its commercial trucking terminal in Mira Loma, California. These hidden surveillance and eavesdropping devices violate at least four sections of the California *Penal Code*: § 653n (prohibits use of two way mirrors in bathrooms); § 647(k) (prohibits using holes or cameras to look into bathrooms); § 632 (prohibits recording confidential communications); and § 635 (prohibits possession of eavesdropping devices). California law provides a private right of action for violation of Penal Code §§ 632 and 635, and California's Constitution and common law provide a private right of action for violation of the right to privacy.

Respondents are employees and others lawfully using the commercial trucking terminal operated by Petitioner, and they brought these lawsuits in California courts alleging only California causes of action. The claims of the Respondents do

not arise from or depend on the terms of a collective bargaining agreement.

This case presents the issue of whether the California state lawsuits filed by the victims of these crimes are preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"). The *en banc* panel of the Ninth Circuit Court of Appeals correctly held that the LMRA does not preempt these lawsuits because the actions of Petitioner Consolidated Freightways are clear violations of California law. Appendix at 18a-19a. The Ninth Circuit concluded that the collective bargaining agreement cannot allow conduct that is illegal under state law, so there is no need to "interpret" the collective bargaining agreement to see if the conduct was allowed by its terms. Appendix at 19a. Consequently, the action is "independent" of the collective bargaining agreement and is, therefore, not preempted. The Ninth Circuit's decision in this case follows all relevant Supreme Court precedent and does not conflict with decisions from other circuits.

The Supreme Court has repeatedly held that § 301 of the LMRA does not grant the parties to a collective bargaining agreement the ability to negotiate or contract for conduct that is illegal under state law. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). States may provide substantive rights to workers without regard to the collective bargaining agreement, and state law claims seeking to vindicate those rights will be preempted only if it "requires the interpretation of a collective bargaining agreement." *Lingle v. Norge*, 486 U.S. 399 (1987).

The Court of Appeals in various circuits have followed the clear rule from the Supreme Court and have held that lawsuits arising out of unlawful activities by employers are not preempted. *See Griess v. Consolidated Freightways*,[1] 882 F.2d

1. Ironically, a number of the published cases in this area are decided against Consolidated Freightways. In at least three published (Cont'd)

461 (10th Cir. 1989); *Kohl's Food Stores v. Hyland*, 32 F.3d 1075 (7th Cir. 1994); *Knafel v. Pepsi Cola*, 899 F.2d 1473 (6th Cir. 1990); *Peterson v. BMI Refractories*, 132 F.3d 1405 (11th Cir. 1998). Contrary to the assertions by Petitioner, other circuits have held that state privacy rights lawsuits are not preempted when the actions by the employer are prohibited by state law, so the Ninth Circuit's opinion does not create a conflict between the circuits. *See Schmidt v. Ameritech*, 115 F.3d 501 (7th Cir. 1997); *Keehr v. Consolidated Freightways*, 825 F.2d 133 (7th Cir. 1987).

STATEMENT OF THE CASE

A. Background Facts about the Actions Alleged in the Complaint

In September of 1997, an employee of Consolidated Freightways discovered by chance that Consolidated Freightways had installed a surveillance camera in a hole in the wall behind a two-way mirror in the men's restroom at its trucking terminal in Mira Loma, California. (Alfaro ER tab 2, page 2.)[2] The mirror shifted after the employee closed the door, and the employee was straightening the mirror when it fell off

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(Cont'd)
cases, Consolidated Freightways has attempted to escape state liability for its wrongful acts based on the argument that the claims were preempted by federal law. The Court of Appeals in three different circuits have rejected that argument. Nevertheless, Consolidated Freightways continues to make the same argument in this case without bothering to cite to the controlling authority previously decided against it. *See Griess v. Consolidated Freightways*, 882 F.2d 461 (10th Cir. 1989); *Parten v. Consolidated Freightways*, 923 F.2d 580 (8th Cir. 1991); *Keehr v. Consolidated Freightways*, 825 F.2d 133 (7th Cir. 1987).

2. This appeal involves two separate but related cases that were joined for appeal. There are two separate sets of excerpts of record. In this brief, excerpts of record from *Cramer v. Consolidated Freightways* are referred to as "Cramer ER", and excerpts of record from *Alfaro v. Consolidated Freightways* are referred to as "Alfaro ER".

the wall, revealing the hidden camera. (Alfaro ER tab 2, page 2.) Employees subsequently discovered that an identical hole was cut into the wall behind the mirror of the adjoining women's restroom. (Alfaro ER tab 15, page 3.) The camera was installed so that it faced out into the restroom and photographed all users of the restroom. Discovery in the case has disclosed that two additional cameras and a microphone were hidden in the ceiling of another men's restroom at the facility.

Employees immediately called the Riverside County Sheriff's Department, which came out to investigate the crime and confiscated three cameras from two men's restrooms as well as additional electronic recording equipment. (Alfaro ER tab 9, page 4.) The Sheriff's deputies confiscated cameras that were hidden behind a two-way mirror and in fire sprinklers in the ceilings of the restrooms. (Alfaro ER tab 9, page 4.)

The restrooms in question are used by Consolidated's approximately 700 employees who work at that facility. (Alfaro ER tab 9, page 4.) They are also used by an unknown number of invitees of the facility, including private security guards, family members of employees, delivery persons, and non-employee truckers who use the terminal. (Alfaro ER tab 9, page 4.)

Discovery in this case and related cases has shown that at least one of the cameras pointed at a urinal in the men's restroom. Consolidated Freightways produced 141 surveillance videotapes during discovery, and those videotapes include hundreds of scenes of men using urinals. Indeed, this should not be a disputed point because Consolidated Freightways's human resources manager Mark Epstein has testified at deposition that the cameras showed urinals, and that he watched them both live and on videotape.[3]

3. Curiously, Petitioner Consolidated Freightways misleadingly asserts in its Petition that "video cameras were directed away from the (Cont'd)

The illegal surveillance devices were all hidden, many in elaborately crafted hiding places. In order to keep the installation secret from the accounting staff at the facility, Consolidated Freightways arranged to have the camera installation company send false invoices for innocuous tasks such as changing lightbulbs. To keep this charade alive, Consolidated Freightways never used videotape evidence in any grievance or disciplinary actions, because doing so would reveal the existence of the cameras. Employees at the trucking terminal were not aware of the installation of these cameras until they were discovered on the night that the Sheriff's Department confiscated the equipment.

B. Procedural History of the Case and the *En Banc* Decision by the Ninth Circuit

Based on these facts, Respondents/Plaintiffs joined together to file a series of lawsuits against Consolidated Freightways in California Superior Court. On October 7, 1997, 282 of the employees joined together to file an action titled *Alfaro v. Consolidated Freightways*. (Alfaro ER tab 1.) The *Alfaro* action alleges six causes of action based on California law, namely: (1) Violation of California's Constitutional Right to Privacy; (2) Violation of California *Penal Code* § 632 (prohibits the use of electronic eavesdropping equipment); (3) Injunctive Relief; (4) Intentional Infliction of Emotional Distress; (5) Negligent Infliction of Emotional Distress; and (6) Violation of California *Penal Code* § 635 (prohibits the possession or installation of eavesdropping equipment). On September 29, 1997, another group of employees and others joined together to file a class-

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(Cont'd)
urinals . . . and that no one was ever videoed while actually using those facilities . . ." Petition at 6. Inexplicably, Petitioner has consistently misrepresented these facts to the courts notwithstanding overwhelming testimonial and documentary evidence to the contrary, including deposition testimony of its own managers and hundreds of hours of videotapes showing urinals and the users of those urinals.

action lawsuit titled *Cramer v. Consolidated Freightways* in the California Superior Court. (Cramer ER 1.) The Cramer action was based on a single cause of action for breach of California's constitutional right to privacy.

Both the *Cramer* and *Alfaro* lawsuits were immediately removed to U.S. District Court by Consolidated Freightways — even before any discovery was done and before Consolidated Freightways filed an Answer. Both lawsuits were dismissed by the District Court on the ground that they were preempted by the LMRA. Appendix at 72a and 79a. Plaintiffs in both actions appealed to the U.S. Court of Appeals for the Ninth Circuit. Initially, a three-judge panel of the Ninth Circuit affirmed the District Court's decision in a 2-1 opinion. Appendix at 35a. Upon reconsideration, an 11-judge *en banc* panel of the Ninth Circuit reversed the District Court in a 10-1 decision.

The *en banc* panel of the Ninth Circuit reviewed all of the relevant U.S. Supreme Court precedent and concluded that Respondents' state lawsuits were not preempted. The *en banc* panel held that Petitioner's conduct at issue in this lawsuit was illegal: "Section 653n of the California Penal Code makes the installation and maintenance of two-way mirrors permitting the observation of restrooms illegal without reference to the reasonable expectations of those so viewed . . . use of the mirrors is a per se violation of the penal code". Appendix at 18a.

The majority opinion then states that "Under settled Supreme Court precedent '§ 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law'." Appendix at 19a. Therefore, "Because installation of two-way mirrors is immutably illegal, and freedom from the illegality is a 'nonnegotiable state law right', a court reviewing plaintiffs' claims that their privacy rights were violated need not interpret the CBA to arrive at its conclusion." Appendix at 19a. Accordingly, the 10-judge majority concluded that the state law claims of the Respondents in this action are not preempted by the LMRA.

Judge O'Scannlain filed the lone dissent that was not joined by any of the other 10 judges on the *en banc* panel. Judge O'Scannlain agreed with the majority that the collective bargaining agreement was "silent . . . on whether Consolidated's precise behavior is allowed". Appendix at 27a. But Judge O'Scannlain believed that the collective bargaining agreement's silence should be treated as an implied waiver of state criminal laws regarding placement of cameras in bathrooms. Appendix at 28a. Thus, the major distinction between the majority opinion and the solo dissent of Judge O'Scannlain involves an interpretation of California law about whether silence can be interpreted as a waiver of state criminal law protection.

REASONS FOR DENYING THE WRIT

I.

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE NINTH CIRCUIT'S OPINION FOLLOWS SUPREME COURT PRECEDENT THAT A COLLECTIVE BARGAINING AGREEMENT CANNOT ALLOW CONDUCT THAT IS ILLEGAL UNDER STATE LAW

In its *en banc* decision, the Ninth Circuit followed controlling precedent from the United States Supreme Court that a collective bargaining agreement cannot allow conduct that is illegal under state law. In 1985, the United States Supreme Court decided the case of *Allis-Chalmers Corp. v. Lueck*, and it is this case that provides the framework for deciding whether the LMRA preempts state lawsuits arising out of illegal conduct by an employer. 471 U.S. 202 (1985). In *Allis-Chalmers*, the Supreme Court held that:

> Clearly, § 301 [of the Labor Management Relations Act] does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law.

471 U.S. 202, 212 (1985).

In 1988, the Supreme Court revisited the subject of LMRA preemption in its *Caterpillar v. Williams* decision. 482 U.S. 386 (1987). In that case, the Court quoted from its earlier *Allis-Chalmers* decision and stated that "it would be inconsistent with congressional intent under [§ 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of the labor contract." 482 U.S. at 395.

The *Caterpillar* decision went on to examine this subject in more length in footnote ten at page 396. In that footnote, the Court stated that "Claims bearing no relationship to a collective bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not pre-empted by § 301." The *Caterpillar* Court then quoted in the same footnote from its earlier case of *Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 25 n.28 (1983):

> Even under § 301 we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section. For instance, a state battery suit growing out of a violent strike would not arise under § 301 simply because the strike may have been a violation of an employer-union contract.

These Supreme Court cases, when taken together, stand for a very simple rule: parties to a collective bargaining agreement cannot agree to allow conduct that is illegal under state law. Indeed, this rule is not unique in the context of LMRA preemption. The Supreme Court has repeatedly stated the rule in other contexts. For example, in *Burundian v. Arkansas-Best Freight Systems*, 450 U.S. 728 (1981), the Supreme Court held that the Fair Labor Standards Act takes precedence over conflicting provisions in a collective bargaining agreement. Likewise, in *United Mine Workers v. Pennington*, the Court held that the terms of a collective bargaining agreement may not "disregard other laws." 381 U.S. 657 (1965).

The Ninth Circuit was well aware of this controlling law. The majority decision in this case cites to the rule from *Allis-Chalmers* that "§ 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." Appendix 19a. The Ninth Circuit's opinion, relying on the rule from *Allis-Chalmers*, stated that "Consolidated was therefore required to abide by the provisions of California penal law, and its employees had a right to assume their employer would obey the law . . . Even if the CBA purported to reduce or limit this expectation in some way, that reduction would be illegal and therefore unenforceable."[4] Appendix 19a.

Consolidated Freightways attempts to argue in its Petition for Writ of Certiorari that the Ninth Circuit was wrong because the legality of its actions cannot be determined without reference to the collective bargaining agreement. That argument is simply wrong. The actions of Consolidated Freightways are an obvious violation of California law, and there is no reason to interpret the collective bargaining agreement to determine the legality of Consolidated's actions. As the Ninth Circuit concluded, "installation of two-way mirrors is immutably illegal." Appendix at 19a. The eavesdropping and surveillance activities done by Consolidated Freightways in this case are illegal under California state law and are specifically prohibited by at least four separate sections of the California *Penal Code,* including the following sections:

> a. **California *Penal Code* § 653n.** Section 653n makes it a misdemeanor to install or maintain a two-way mirror in a bathroom, to wit:

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4. In that regard, the Ninth Circuit cited to both federal and state law. California follows the common law rule that illegal contracts are void and unenforceable. California has codified this rule in several of its *Civil Code* sections, including §§ 1668, 1598, 1599, 1608, and 1667. Under California law, any portion of a contract that attempted to allow illegal conduct would be void.

Any person who installs or who maintains after April 1, 1970, any two-way mirror permitting observation of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or hotel room, is guilty of a misdemeanor.

b. **California *Penal Code* § 647(k).** Section 647(k) makes it a misdemeanor to engage in certain specified acts, including:

Anyone who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including but not limited to, a periscope, telescope, binoculars, camera, or camcorder, the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside.

c. **California *Penal Code* § 632.** Section 632 makes it illegal to eavesdrop or record confidential communications by means of electronic recording or amplification devices. The Complaint alleges that Consolidated Freightways used hidden surveillance devices to listen to and record employee communications in the bathrooms and in other areas. (Alfaro ER, tab 1.) Under case law, the statute prohibits both audio and video recording of communications. *People v. Gibbons*, 215 Cal.App. 3d 1204, 263 Cal. Rptr. 905 (1990) [Secret videotaping of sexual acts without sound violates the statute].

d. **California *Penal Code* § 635.** Section 635 makes it illegal to possess or sell eavesdropping devices, such as the ones used for activities outlawed in *Penal Code* § 632.

Petitioner's violations of these statutes in the present case are obvious. In an effort to shift attention away from its criminal acts, Petitioner mistakenly argues that the lawsuit should be preempted because the Court is required to interpret the collective bargaining agreement to determine whether the employees had an expectation of privacy while using the restroom. Petitioner hopes by this circular argument to escape liability for its corporate criminal acts.

Unfortunately for Petitioner, its argument ignores the fact that California's courts have held that the state's constitution and criminal law provide users of a restroom with a reasonable expectation of privacy *as a matter of law*. There is simply no need to interpret a collective bargaining agreement to determine whether Petitioner's actions violated state criminal law.

California *Penal Code* §§ 653n and 647(k) outlaw specified types of surveillance in bathrooms *regardless* of whether there is a determination of an expectation of privacy. The explicit language of § 653n makes no mention about a "reasonable expectation of privacy". The statute simply outlaws the use of two-way mirrors in certain locations. Indeed, cases interpreting § 653n have concluded that its very enactment indicates a public policy that there is a reasonable expectation of privacy in a restroom. For example, in *People v. Metcalf*, the California Appellate Court held that "the enactment of [Penal Code] section 653n enunciates a public policy against clandestine observation of public restrooms and renders it reasonable for users thereof to expect that their privacy will not be surreptitiously violated." 22 Cal. App. 3d 20, 23-24, 98 Cal. Rptr. 925 (1971). As the Ninth Circuit concluded,

> Section 653n of the California Penal Code makes the installation and maintenance of two way mirrors permitting the observation of restrooms illegal without reference to the reasonable expectation of those so viewed. Determination of guilt under the

> statute is not dependent on context or subjective factors; use of the mirrors is a per se violation of the penal code . . .

Appendix at 18a.

Thus, neither California *Penal Code* §§ 647(k) nor 653n requires an inquiry into whether Respondents' expectation of privacy in a restroom was reasonable. Even if such an analysis were necessary under those statutes, California case law is clear that the expectation of privacy that people have in a restroom is reasonable as a matter of law. In *People v. Triggs*, the California Supreme Court held that "[t]he expectation of privacy a person has when he enters a restroom is reasonable . . ." 8 Cal. 3d 884, 891, 106 Cal. Rptr. 408, 412 (1973), *disapproved on another point in People v. Lilienthal*, 22 Cal. 3d 891, 896 n.4, 150 Cal. Rptr. 910 n.4 (Cal. 1978). Likewise, in *People v. Metcalf*, the California Appellate Court held that it is "reasonable for users thereof [of a bathroom] to expect that their privacy will not be surreptitiously violated." 22 Cal. App. 3d 20, 23-24, 98 Cal. Rptr. 925 (1971). *See also Young v. Superior Court of Tulare County*, 57 Cal. App. 3d 883, 887, 129 Cal. Rptr. 422, 425 (1976) ("An occupant of a closed bathroom, the same as an occupant of a closed bedroom, is entitled to an expectation of privacy far greater than those persons in the common areas of a house . . .").

Based on these California authorities, the Ninth Circuit concluded that there would be no reason to interpret the collective bargaining agreement to determine whether the employees had a reasonable expectation of privacy. The Ninth Circuit cited to *Allis-Chalmers* and then held that the LMRA does not preempt the instant lawsuit because it arises from the violation of the state criminal laws by the employer. As such, no possible interpretation of the collective bargaining agreement could allow conduct that is criminal under state law. Because there is no reason to interpret the collective bargaining agreement to determine if the illegal conduct is allowed, the state lawsuit

is "independent" of the collective bargaining agreement and is not preempted. Appendix at 21a. This holding is entirely consistent with Supreme Court authority and does not create conflict with other circuits.

II.

RESPONDENTS' INDEPENDENT ACTIONS UNDER STATE LAW ALLEGING ONLY STATE CAUSES OF ACTION ARE NOT PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT

Respondents in these cases brought independent actions in California courts alleging only California causes of action unrelated to the collective bargaining agreement. These actions are independent of the collective bargaining agreement because they can be resolved by reference only to California state law, and they should not be preempted.

The federal LMRA only preempts state law causes of action that are "substantially dependent" on analysis of a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). If a state cause of action is not "substantially dependent" on a collective bargaining agreement, then the state case is *not* preempted and there is no federal subject matter jurisdiction. As the Supreme Court wrote in *Caterpillar*, ". . . a plaintiff covered by a collective bargaining agreement is permitted to assert legal rights *independent* of the agreement . . ." 482 U.S. at 396. (Emphasis in original).

But what is meant by "independent" rights? The Supreme Court has addressed that issue in a number of cases. In *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1987), the Court wrote that "independent" means that "resolution of the state-law claim does not require construing the collective bargaining agreement." 486 U.S. at 407. In that case, the Court was faced with a plaintiff who was subject to a collective bargaining agreement that provided for arbitration of termination issues,

but the plaintiff chose instead to file a state-law wrongful termination claim. The Court allowed the plaintiff to pursue his state law cause of action for wrongful termination, holding that the claim was not preempted by the LMRA for the following reason:

> [E]ven if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claims can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes.

Id. at 409-410.

The Supreme Court visited this same issue again in *Livadas v. Bradshaw*, 512 U.S. 107 (1994). In *Livadas*, the Court stated that ". . . when the meaning of contract terms [i.e. collective bargaining agreement terms] is not the subject of dispute, the bare fact that a collective bargaining agreement will be consulted in the course of state law litigation plainly does not require the claims to be extinguished." *Id.* at 124.

In this case, Respondents filed actions that are "independent" under California law and require no reference to the collective bargaining agreement. Both the *Cramer* and *Alfaro* Plaintiffs/Respondents filed causes of action for violation of the right to privacy found and explicitly guaranteed in the California Constitution. The *Alfaro* Plaintiffs/Respondents also brought causes of action for violation of California *Penal Code* §§ 632 and 635. (Alfaro ER, Tab 1.) California *Penal Code* § 637.2 gives a private, civil right of action for violation of California *Penal Code* §§ 632 and 635.

California's protection of privacy rights is long-standing and firm. In 1967, California's Legislature explained in *Penal Code* § 630 its policy reasons for enacting certain *Penal Code*

provisions protecting privacy (including §§ 632 and 635, which are at issue in this case):

> The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society. The Legislature by this chapter intends to protect the right of privacy of the people of this state.

California's Constitution contains an explicit guarantee of the right to privacy. This right to privacy was added to Article 1, § 1 of the California Constitution by statewide initiative in 1972. The privacy rights protections covered by the California Constitution were motivated by "the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." *White v. Davis*, 13 Cal. 3d 757, 773-774, 120 Cal. Rptr. 94, 105 (1975). Unlike federal constitutional privacy rights, the privacy rights in the California Constitution apply to both private and governmental intrusions on privacy. *Hill v. NCAA*, 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834 (1994). Violations of the constitutional right to privacy may be enforced with actions for damages or injunctive relief. *White v. Davis*, 13 Cal. 3d 757, at n.8.

As part of its long-standing commitment to privacy rights, California allows private lawsuits for violation of privacy rights. Within the past decade, California's Supreme Court has decided two cases that clearly and unambiguously set forth the elements of a cause of action for violation of the constitutional right to privacy. *Hill v. NCAA*, *supra.*, 7 Cal. 4th at 34-38, 26 Cal. Rptr. 2d at 856-857; *Loder v. City of Glendale*, 14 Cal. 4th 846, 896,

59 Cal. Rptr. 2d 696, 728 (1997). Under *Hill* and *Loder*, all of the elements of a cause of action for violation of the California state right to privacy can be shown without reference to the collective bargaining agreement. The *Hill* case holds that "the observation of urination — a human excretory function — obviously implicates privacy interests." *Hill*, *supra* at 41. Urination, and presumably other excretory functions, involve legally-protected privacy rights whether or not they are directly observed. *Loder*, *supra*, 14 Cal. 4th at 896. As discussed in detail in section I of this brief, California's courts have repeatedly held that users of a restroom — even a public restroom — have a reasonable expectation of privacy. *See People v. Triggs*, *supra*, 8 Cal. 3d at 891.

In order to escape the obvious fact that Respondents' state law claims do not require any reference to the collective bargaining agreement, Petitioner Consolidated Freightways mistakenly argues that the California state law claims should be preempted because their *defense* might involve interpretation of the collective bargaining agreement. Such an argument was rejected by the Ninth Circuit in its *en banc* decision (Appendix at 17a), and it has been repeatedly and decisively rejected by the U.S. Supreme Court. In *Caterpillar v. Williams*, the Supreme Court held that

> it is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

482 U.S. at 393. *Caterpillar* went on to hold that

> [A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in

> which the claim shall be litigated . . . Congress has long since decided that federal defenses do not provide a basis for removal.

Id. at 399.

The Ninth Circuit correctly recognized that Respondents' state law claims are based on "constitutional and statutory rights of privacy guaranteed to all persons, whether or not they happen to work subject to a [collective bargaining agreement]" and are, thus, independent of the collective bargaining agreement. Appendix at 16a. California law is sufficiently developed that Respondents will be able to satisfy and prove their privacy rights causes of action without reference to the collective bargaining agreement, so these actions are "independent" and are not preempted by the LMRA.

III.

THE NINTH CIRCUIT'S OPINION IN THIS CASE FOLLOWS SUPREME COURT PRECEDENT THAT WAIVERS OF STATE RIGHTS MUST BE "CLEAR AND UNMISTAKABLE"

Petitioner argues that interpretation of the collective bargaining agreement is required to determine if Respondents waived their privacy protections of the California *Penal Code*. That argument is wrong because Supreme Court cases have made it clear that waivers of state law rights in a collective bargaining agreement must be "clear and unmistakable". In the present case, even a cursory look at the collective bargaining agreement shows that it is silent on the subject of placement of cameras in violation of state laws, so there is no "clear and unmistakable" waiver of privacy rights in this case.

The "clear and unmistakable" test comes from a series of United States Supreme Court cases over the past two decades. In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), the Supreme Court held that waivers of state law rights under a

collective bargaining agreement must be "clear and unmistakable". This same language was later quoted and followed by the Supreme Court in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409-410 n.9 (1987), *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994), and, most recently, in *Wright v. Universal Maritime Service*, 525 U.S. 70 (1998).

In *Livadas*, the Supreme Court was faced with a case in which it was argued that an employee had bargained away certain protections in the California *Labor Code* by becoming a member of a collective bargaining agreement. The Supreme Court disagreed, and stated that:

> There is no suggestion here that [the employee's] union sought or purported to bargain away her protections under [California *Labor Code*] § 201 or § 203, a waiver that we have held would . . . have to be "clear and unmistakable" [citations omitted] for a court even to consider whether it could be given effect . . .

512 U.S. at 125.

The Ninth Circuit's *en banc* panel followed this "clear and unmistakable" rule when dealing with waiver arguments advanced by Petitioner. Appendix 13a. Petitioner claims that two provisions of the collective bargaining agreement act as a waiver of state law surveillance rights: Article 35, which deals with drug testing but does not contain one word on the use or placement of cameras (whether hidden or not), and Article 26, which contains a procedural rule dealing with use of videotape evidence at grievance hearings but is silent on the placement of cameras.

However, as the Ninth Circuit concluded, even a "cursory examination of those provisions makes clear they apply to a completely different context and set of circumstances."

Appendix 16a.[5] The Ninth Circuit concluded that neither of the two provisions raised by Petitioner "purports to have any bearing on secret spying on Consolidated's employees in company restrooms". Appendix 16a. As Ninth Circuit Judge Fisher stated: "[T]he collective bargaining agreement ("CBA") in question does not discuss — even implicitly — surreptitious surveillance of restrooms . . ." Appendix 63a. Indeed, even the sole dissenting Ninth Circuit judge agreed that the collective bargaining agreement is "silent" on the subject of placement of cameras. Appendix at 27a.

Assuming, arguendo, that the two cited provisions could possibly be construed as an attempted waiver of state law protections, such a waiver would be invalid under California law. Under California law, a person can waive a law "intended solely for his benefit" but cannot waive a law "established for a public reason". California *Civil Code* § 3513. California's courts have held that penal statutes "are conclusive evidence that the prohibited acts would be against the public interest" and are, thus, not waivable. *De Haviland v. Warner Bros. Pictures*, 67 Cal. App. 2d 225, 236, 153 P.2d 983 (Cal. Ct. App. 1944). *See also Berka v. Woodward*, 125 Cal. 119, 57 P. 777 (1899); *Benane v. International Harvester Company*, 142 Cal. App. 2d Supp. 874, 299 P.2d 750 (1956); *Western Surgical Supply v. Affleck*, 110 Cal. App. 2d 388, 242 P.2d 929 (Cal. Ct. App. 1952). Even if the criminal statutes at issue were waivable in California (which they are not), waiver is only valid under California law if it is the "intentional relinquishment or abandonment of a known right". *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 946 P.2d 427 (1997).

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5. Under well-settled law, a court is allowed to examine a collective bargaining agreement to determine if the claims are preempted without actually "interpreting" the agreement. *See Livadas v. Bradshaw, supra*, 512 U.S. at 125; *Milne Employees Association v. Sun Carriers*, 960 F.2d 1401, 1410-11 (9th Cir. 1991).

In the present case, there was no waiver under California law because the employees did not know about the surveillance, and, as such, there was no "intentional relinquishment or abandonment" of the *Penal Code* protections. As Judge Fisher noted, "Indeed, the surreptitious nature of the violation of plaintiffs' privacy belies any notion of bargaining or consent to hidden cameras behind two-way mirrors." Appendix at 16a.

Based on these facts, the Ninth Circuit concluded that there was no "clear and unmistakable" waiver of state criminal laws by Respondents. This holding is completely in keeping with all relevant Supreme Court precedent, and it follows California state law on the subject of waiver of penal code protections.

IV.

THE NINTH CIRCUIT'S OPINION IN THIS CASE DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

A. Other Circuits Hold that Lawsuits Arising out of Activities that violate State Law are Not Preempted.

The Ninth Circuit's *en banc* opinion in this case is entirely consistent with the oft-repeated rule from other circuits that the LMRA does not preempt state lawsuits arising from activities prohibited by state law.

As discussed earlier, the Supreme Court has repeatedly held that parties to a collective bargaining agreement cannot contract for conduct that is illegal under state law. Therefore, lawsuits alleging illegal or prohibited behavior by an employer do not require interpretation of a collective bargaining agreement and are not preempted by the LMRA. This simple rule has been followed in all of the circuits, and the following cases from various of the circuits are illustrative of this rule:

• *Peterson v. BMI Refractories*, 132 F.3d 1405 (11th Cir. 1998). In this case, a union employee sued his employer for

assault, battery, outrage (infliction of emotional distress), and discrimination. The Eleventh Circuit held that the lawsuit was not preempted because the right of an employee to be free from criminal acts is nonnegotiable and does not require interpretation of a collective bargaining agreement.

• *Kohl's Food Stores v. Hyland*, 32 F.3d 1075 (7th Cir. 1994). In this case, a union employee brought an action against his employer for refusing to reinstate him to a job in violation of Wisconsin law. The Seventh Circuit held that the state lawsuit was not preempted because the employer's actions were illegal under Wisconsin law.

• *Knafel v. Pepsi Cola*, 899 F.2d 1473 (6th Cir. 1990). In this case, a union employee brought an action against her employer alleging wrongful termination and emotional distress after she was fired for making an EEOC complaint and for filing an Ohio workers' compensation claim. The Sixth Circuit cited to *Allis-Chalmers* and held that the action was not preempted because both federal law and Ohio law prohibited retaliatory firing by an employer, and resolution of the Ohio state claim did not require interpretation of a collective bargaining agreement.

• *Griess v. Consolidated Freightways*, 882 F.2d 461 (10th Cir. 1989). In this case, a union employee sued his employer for retaliatory firing after he filed a workers' compensation claim. The Tenth Circuit held that retaliatory firing is prohibited by Wyoming law, so the state lawsuit is not preempted.

• *Owen v. Carpenter's Council*, 161 F.3d 767 (4th Cir. 1998). In this case, a union employee sued her employer alleging firing after she reported sexual harassment. The Fourth Circuit held that Maryland law does not allow discrimination for reporting sexual harassment, so her state lawsuit is not preempted.

• *Ralph v. Lucent*, 135 F.2d 166 (1st Cir. 1998). In this case, a union employee sued under the federal Americans with

Disabilities Act and Massachusetts handicap discrimination statute. The First Circuit held that handicap discrimination is barred by clear Massachusetts law without reference to the collective bargaining agreement, so the state lawsuit was held not preempted.

• *Anderson v. Ford Motor Company*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011. In this case, union workers brought a state action against their employers for fraud and contract claims. The Eighth Circuit cited to *Allis-Chalmers*, and concluded that the actions were not preempted because "Fraud is a common law tort deeply rooted in local standards of individual and social responsibility." *Id.* at 957.

The cases listed above are only a small sampling of the published Court of Appeals cases on the subject.[6] The published cases show that the various circuits of the Court of Appeals have adopted a rule that lawsuits arising out of prohibited activity by an employer are not preempted if the state has clearly prohibited the activity through its statutes or case law. Thus, dozens of published cases show that the different circuits of the Court of Appeals have held that lawsuits involving such prohibited actions as retaliatory discharge, fraud, discrimination, and assault are not preempted.

The Ninth Circuit's *en banc* decision in this case is entirely in keeping with the line of authority cited above. In this case, the Ninth Circuit held that the activities by Consolidated Freightways were illegal and prohibited by California criminal

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6. Other cases with similar holdings include: *Bettis v. Oscar Mayer*, 878 F.2d 192 (7th Cir. 1989); *Smolarek v. Chrysler*, 879 F.2d 1326 (6th Cir. en banc, 1989), *cert. denied*, 493 U.S. 992; *Taggart v. Trans World Airlines*, 40 F.2d 269 (8th Cir. 1994); *Galvez v. Kuhn*, 933 F.2d 733 (9th Cir. 1991); *Miller v. AT & T*, 850 F.2d 543 (9th Cir. 1988); *Jimeno v. Mobil Oil*, 66 F.3d 1514 (9th Cir. 1995); *Martin Marrietta v. Maryland*, 38 F.3d 1392 (4th Cir. 1994); *Ramirez v. Fox Television*, 998 F.2d 743 (9th Cir. 1993); *Pennsylvania Nurses Association v. Pennsylvania State Education Association*, 90 F.3d 797 (3d Cir. 1996).

law. That decision follows a long line of Court of Appeals cases in similar situations, and it does not create any conflict between the circuits.

B. At least Two Other Published Cases Have Held that State Privacy Rights Lawsuits Arising out of Prohibited Conduct by an Employer are not Preempted.

Consolidated Freightways argues in its Petition that other decisions of other circuits have "uniformly" held that LMRA preempts privacy rights cases. Petition at 25. That is not true, and Consolidated Freightways should be well aware of that fact, because one of the published cases is against Consolidated Freightways. At least two published Court of Appeals cases have held that state privacy rights lawsuits arising out of prohibited conduct by an employer are not preempted by the LMRA.

In *Schmidt v. Ameritech*, the Seventh Circuit was faced with a state privacy rights lawsuit from a union employee of a telephone company who sued his employer for using confidential telephone records to investigate his disability leave. 115 F.3d 501 (7th Cir. 1997). In that case, the Court concluded that both state and federal law were violated by the employer: "We note in this connection that Illinois has recognized a distinct privacy right in one's telephone records based on Article I, Section 6 of the Illinois Constitution, which provides broader privacy protection than does the U.S. Constitution." *Id.* at 506. The Seventh Circuit held that the claim was not preempted because it depended on the "scope of Illinois privacy law" and not on the scope of the collective bargaining agreement. *Id.* at 505.

In *Keehr v. Consolidated Freightways*, the Seventh Circuit was faced with a privacy rights and infliction of emotional distress claim from an employee who alleged that his employer had made rude comments about his wife's sexual practices after a workplace argument. 825 F.2d 133 (7th Cir. 1987). A jury had found that the comments were "outrageous" and therefore

punishable under Indiana law. The Seventh Circuit concluded that the suit was not preempted because the actions were "outrageous".

Thus, contrary to the assertions by Consolidated Freightways in this case, there is no uniform rule against privacy rights cases in the Court of Appeals decisions. To the contrary, the cases all appear to follow the Supreme Court's rule that cases should be decided on a "case-by-case basis". *Allis-Chalmers Corp. v. Lueck, supra*, 471 U.S. at 220. In the two cases cited above, the employer's actions either violated state law or were "outrageous", so the state lawsuits were not preempted. These two cases are consistent with the Ninth Circuit's *en banc* decision in the present case, which held that the present lawsuit was not preempted after concluding that the actions by Consolidated Freightways were illegal under California law.

C. The Court of Appeals Cases Cited by Consolidated Freightways are Easily Distinguishable From this Case.

Consolidated Freightways attempts to manufacture a conflict between the circuits by citing to a series of privacy rights cases that it contends create a conflict between the circuits. However, all of the cases cited by Consolidated Freightways are easily distinguishable from this case because they do not involve employer conduct that is illegal.

In its Petition, Consolidated Freightways mistakenly claims that the Seventh Circuit's cases of *Brazinski v. Amoco Petroleum* and *In re Amoco Petroleum Additives Co.* are in conflict with the Ninth Circuit's opinion in this case. In fact, both *Brazinski* and *Amoco* are easily distinguishable from the present case, so they are not conflicting precedent.

Brazinski and *Amoco* are two opinions originating from the same case. *Brazinski v. Amoco Petroleum*, 6 F.3d 1176 (7th Cir. 1993); *In re Amoco Petroleum Additives*, 964 F.2d 706

(7th Cir. 1992). The case arose when Amoco Petroleum installed "a video camera in the ceiling of the entrance hallway, which enabled the firm to record who entered and left the locker room, and when, but not what they were doing inside." *Amoco*, 964 F.2d at 707. A lawsuit was brought against Amoco Petroleum under Illinois state law with causes of action for violation of privacy under Illinois common law and intentional infliction of emotional distress.

The *Brazinski/Amoco* cases are distinguishable from the present case because the *Brazinski* and *Amoco* cases did not involve criminal acts by the employer. Apparently Illinois has not chosen to criminalize the surveillance activities involved in that case. Indeed, the *Amoco* Court noted that "Plaintiffs concede that a collective bargaining agreement could authorize surveillance . . ." 964 F.2d at 706. In contrast, the actions of Consolidated Freightways in the present case are criminal and prohibited by California *Penal Code* §§ 632, 635, 647(k), and 653n. It is settled law that a collective bargaining agreement cannot authorize conduct that is illegal under state law, so the distinction between legal acts and illegal acts is vitally important to LMRA preemption analysis. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). In the present case, one of the central points in the Ninth Circuit's opinion is that the collective bargaining agreement *cannot* authorize the conduct at issue because it is criminal, and the Ninth Circuit realized that this was the critical distinction between the instant case and the Seventh Circuit's *Amoco* and *Brazinski* cases. Appendix at 17a n.6.

Consolidated Freightways also cites to a series of cases from other circuits holding that privacy rights cases are preempted, including *Jackson v. Liquid Carbonic*, 863 F.2d 111 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989); *Kirby v. Allegheny Beverage Corporation*, 811 F.2d 253 (4th Cir. 1987); and *Clark v. Newport News Shipbuilding*, 937 F.2d 934 (4th Cir. 1991). Each of those cases is easily distinguishable from the instant

case because each involved drug testing or searches of employees that were allowed by state law. In contrast, the instant case involves activity that is prohibited by the criminal laws of California.

For example, in *Jackson v. Liquid Carbonic, supra.*, the First Circuit dealt with a privacy rights claim from an employee who had tested positive for drug use. The First Circuit went through an exhaustive discussion about Massachusetts statutory and common law, concluding that "Massachusetts has not prohibited drug testing outright; in the commonwealth there is no barrier to a person's free and voluntary agreement to be tested. By the same token, neither Massachusetts' constitution nor its statutory scheme accomplish proscription by indirection." 863 F.2d at 115. Only after concluding that drug testing was legal in Massachusetts did the First Circuit hold that the privacy rights lawsuit was preempted. Thus, the *Jackson* case is easily distinguishable because the employer's conduct was not illegal. Indeed, even within the First Circuit (which decided *Jackson*), there are published cases holding that the LMRA does not preempt state lawsuits alleging illegal conduct by an employer. *See Ralph v. Lucent*, 135 F.2d 166 (1st Cir. 1998)

Petitioner's claim of conflict between the circuits simply does not hold up to scrutiny. Each of the cases cited by Petitioner is distinguishable from the present case because each of the cases relied upon by Petitioner arises out of an employer's conduct that is legal under state law. *See, e.g., Clark v. Newport News Shipbuilding, supra.*, ["Appellant cites to no independent state law or policy regarding drug testing . . ."] As such, there is no conflict between the circuits that would require this Court to grant Certiorari.

CONCLUSION

For the foregoing reasons, Respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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v.

LLOYD W. CRAMER, *et al.*
Respondents.

CONSOLIDATED FREIGHTWAYS CORPORATION, *et al.*
Petitioners,

v.

GUILLERMO ALFARO, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

Respondents do not deny the importance of this case. This Court has long recognized that "[i]f the policies that animate § 301 are to be given their proper range," *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 210 (1985), all state law claims that "depend[] upon the meaning of a collective-bargaining agreement" for their resolution must be pre-

empted. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988). The en banc Ninth Circuit held that a court may "look to" a CBA "to determine whether a plaintiff's claim necessarily implicates its terms without 'interpreting' the agreement." Pet. App. 16a. That holding—which represents the court's attempt to "clarif[y] and correct[]" the Ninth Circuit's prior "approach to § 301 preemption," Pet. App. 6a, 13a—threatens to erode this Court's § 301 jurisprudence and undermine the federal policies this Court has endeavored to promote. The court's holding is binding on all federal courts in the nine states the Ninth Circuit comprises and establishes the analytical framework to be applied in every § 301 preemption case. It will thus affect the interpretation of innumerable CBAs.[1]

The en banc Ninth Circuit's holding therefore warrants this Court's review. Indeed, respondents make little attempt to argue otherwise, focusing instead on the Ninth Circuit's *alternative* holding. Their arguments notwithstanding, that holding—which "threatens the ability of * * * parties to negotiate legitimate expectations of privacy," Pet. App. 23a—provides an equally compelling basis for review.

1. a. Respondents altogether ignore the multiple conflicts created by the en banc Ninth Circuit's principal holding. As we explained, that holding directly conflicts with this Court's precedents holding that § 301 preempts any state law claim that "depends upon the meaning of a collective-bargaining agreement" for its resolution. *Lingle*, 486 U.S. at 406. *See* Pet. 12-17. In particular, the decision below conflicts with *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 214-215, and *International Brotherhood of Electrical Workers* v. *Hechler*, 481 U.S. 851, 861-862 (1987), in which this Court held that

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[1] Indeed, the Ninth Circuit has already applied the decision below in another case. *See Sprewell* v. *Golden State Warriors*, 266 F.3d 979, 990-992 (2001).

tort claims were preempted because reference to the CBA at issue was required to determine whether it created an *implied* duty or obligation. Indeed, as we noted, the fact that the CBA here expressly contemplates the use of video surveillance—which respondents do not deny—makes this an even stronger case for preemption than either *Allis-Chalmers* or *Hechler*. *See* Pet. 14-16. Respondents, however, do not offer any response.

b. We also explained how the Ninth Circuit's holding conflicts with this Court's precedents recognizing that CBAs "may include implied, as well as express, terms." *Consolidated Rail Corp.* v. *Railway Labor Execs.' Ass'n*, 491 U.S. 299, 311 (1989). *See* Pet. 17-18. Although the en banc Ninth Circuit essentially repudiated this line of authority, *see* Pet. App. 13a-15a, respondents again have nothing to say.

c. Except to note that other decisions apparently did not involve allegations of criminal conduct, respondents fail to address the conflicts between the en banc Ninth Circuit's principal holding and the decisions of numerous other federal circuits that have faithfully adhered to this Court's precedents and held that § 301 preempts claims involving " 'condition[s]' of employment," such as workplace privacy. *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 710 (7th Cir. 1992). *See* Pet. 18-22.[2] As the dissent below recognized, "Consolidated's argument [in favor of preemption] is *much stronger* than arguments other courts have accepted for the purposes of finding preemption" in other cases, Pet. App. 29a (emphasis added), including the Seventh Circuit in *In re Amoco Petroleum Additives Co.*, *supra*, where the court held that workplace privacy claims were preempted even though the CBA at issue contained "not one word" about surveillance. 964 F.2d at 709. The irreconcilable conflict between

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[2] As we explain below, respondents' attempt to distinguish these cases on the basis of alleged criminal conduct is unavailing.

the Seventh Circuit's decision in *Amoco* and the decision below alone merits this Court's review.

d. Instead of confronting these undeniable conflicts, respondents attempt to defend the en banc Ninth Circuit's principal holding by arguing that a "clear and unmistakable" waiver of their privacy rights was required and that "even a cursory look at the [CBA] shows that it is silent on the subject of placement of cameras." Opp. 17. *See id.* at 17-20. But that attempt cannot save the en banc Ninth Circuit's erroneous decision. Even if a "clear and unmistakable" waiver were necessary, whether there has been such a waiver would still require reference to, and interpretation of, the CBA because it expressly deals with the subject of video surveillance. In any event, the Ninth Circuit's holding was not based on the absence of a "clear and unmistakable" waiver, so the need for review remains. *See* Pet. 16a, 18a.

2. Respondents spend most of their efforts attempting to persuade this Court to deny certiorari because—in their view—the challenged surveillance violated § 653n of the California Penal Code.[3] Their arguments, however, are mere red herrings that should be rejected. To begin with, the Ninth Circuit did not rely on § 653n in holding that it "need not 'interpret' the CBA to see that it does not contemplate the surreptitious videotaping plaintiffs challenge in their state law claim." Pet. App. 18a. Thus, respondents' arguments in this respect do not respond at all to the need for review of the en banc court's principal holding.

Moreover, respondents' reliance on § 653n to establish their claims does not remove their claims from the preemptive scope of § 301. Respondents have brought civil claims for invasion of privacy. As we explained—and respondents

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[3] The authorities who investigated the conduct in this case and declined to press charges apparently took a contrary view. *See* Pet. 6.

do not contend otherwise—to prevail on those civil claims respondents must show " 'a reasonable expectation of privacy on [their] part.' " Pet. App. 30a n.6 (quoting *Hill* v. *NCAA*, 865 P.2d 633, 655 (Cal. 1994)). If respondents consented to the challenged surveillance through their union in the CBA, that " 'obviously affect[ed] [their] expectations' " of privacy. Pet. App. 33a (quoting *Hill*, 865 P.2d at 655).[4]

That is true regardless of whether the challenged surveillance in fact violated § 653n or whether § 653n confers a " 'nonnegotiable state-law right[]' " to be "free[] from the illegality [of two-way mirror surveillance]." Pet. App. 19a (quoting *Allis-Chalmers*, 471 U.S. at 213).[5] The en banc Ninth's Circuit's contrary conclusion—that a person consenting to such surveillance nevertheless has a reasonable expectation of privacy as a matter of law—cannot withstand scrutiny. As Judge O'Scannlain explained in his dissent, to establish a "reasonable expectation on [his] part," a plaintiff

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[4] Respondents do not dispute that their union was authorized to consent on their behalf. Nor do they dispute that the CBA provides them with the traditional remedy of arbitration.

[5] We note again that such propositions are highly questionable at best. *See* Pet. 24 & n.15. As Judge O'Scannlain observed in his dissent, "it is far from clear whether Consolidated's videotaping violated § 653n," as the California Supreme Court has indicated that the statute would appear to prohibit only " 'clandestine, *unexpected*' viewing." Pet. App. 31a n.7 (quoting *In re Deborah C.*, 635 P.2d 446, 452 (Cal. 1981)) (emphasis added by dissent). Thus, "one of the modes of 'observation' from which § 653n does not make [respondents] 'immune' is an 'expected' viewing from behind a two-way mirror." *Id.* "Such a viewing would be 'expected' if [respondents] consented to it in the CBA." *Id.* Any other interpretation "would allow the State to prosecute criminally someone who erects a two-way mirror at the invitation of the person he is videotaping." *Id.* Thus, even assuming, as respondents contend (Opp. 19), that in California criminal statutes cannot be waived—a broad proposition for which the cases cited by respondents do *not* stand—§ 653n simply cannot be read to prohibit consensual viewing.

must demonstrate both that he had a "subjective" expectation of privacy and that his expectation was reasonable. *See* Pet. App. 30a & n.6. And as he further pointed out, "there simply is no decision of the California Supreme Court which holds as a matter of law that one has a *subjective* expectation of privacy from illegal intrusions to which one has consented." Pet. App. 32a (emphasis added). Indeed, as he put it, it is "doubt[ful] that there will ever be such a holding of the California Supreme Court" because it would "lead to the ridiculous situation in which I could *invite* someone to videotape me behind a two-way mirror, only to then turn around and sue that person for violating my right to 'privacy.' " *Id.* (emphasis in original).

In short, respondents' privacy claims turn on whether respondents had a "reasonable expectation of privacy on their part" in the restrooms at the Mira Loma terminal. That depends on whether they consented, through their union, to the challenged workplace surveillance. And whether they consented to that surveillance "depends upon the meaning" of the CBA. *Lingle*, 486 U.S. at 406. As the dissent below recognized and the initial panel concluded, Section 653n does not change any of this.[6]

3. a. Once this much is clear, respondents' arguments fall by the wayside. For instance, respondents argue that their claims are not preempted because "parties to a collective bargaining agreement cannot agree to allow conduct that is illegal under state law." Opp. 8. *See id.* at 7-9. But this case is not about whether the CBA's video surveillance provisions

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[6] Although respondents "principally rely," Pet. App. 51a n.9—and in reaching its alternative holding the en banc Ninth Circuit exclusively relied—upon § 653n, respondents also contend that that the challenged surveillance violated other provisions of the California Penal Code. *See* Pet. 9 n.6. As the initial panel concluded in its decision, those provisions also "hinge[] on the absence of consent," Pet. App. 52a n.9, so they likewise have no effect on the preemption of respondents' claims.

are enforceable. As discussed, this case is about whether respondents can prove they had a "reasonable expectation of privacy on their part" in the restrooms at the Mira Loma terminal and prevail on their claims for damages. If respondents consented to the challenged surveillance through their union in the CBA, that " 'obviously affect[ed] [their] expectations.' " Pet. App. 33a (quoting *Hill*, 865 P.2d at 655).

b. Respondents also argue that there is no need to interpret the CBA because "California's courts have held that the state's constitution and criminal law provides users of a restroom with a reasonable expectation of privacy *as a matter of law*." Opp. 11 (emphasis in original). As discussed, however, an invasion of privacy claim also requires a "subjective" expectation of privacy. And as Judge O'Scannlain observed in his dissent, even if the expectation of privacy in a restroom is "reasonable" as a matter of California law, that "does not establish * * * whether [respondents] had a *subjective* expectation of privacy in the restroom." Pet. App. 32a.[7]

c. Finally, respondents argue that their claims are "independent" of the CBA because they can be resolved without reference to the CBA. *See* Opp. 13-17. As the foregoing makes clear, that contention is simply without merit.[8]

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[7] Indeed, even cases on which respondents rely (Opp. 11-12) stand only for the proposition that one has a reasonable expectation of privacy from observation to which one has not consented. *See, e.g., People* v. *Metcalf*, 98 Cal. Rptr. 925, 927 (Ct. App. 1971) (holding that § 653n "enunciates a public policy against *clandestine* observation of public restrooms and renders it reasonable for users thereof to expect that their privacy will not be *surreptitiously* violated") (emphases added). *See also* Pet. App. 31a n.7 (noting that *People* v. *Triggs*, 506 P.2d 232 (Cal. 1973), has been clarified by the California Supreme Court to "extend[] only to 'clandestine, *unexpected*' viewing") (quoting *In re Deborah C.*, 635 P.2d at 452) (emphasis added by dissent).

[8] Seeking to avoid this conclusion, respondents mischaracterize this case as one involving a "*defense*" that "might involve interpretation of the

4. a. Respondents fare no better when it comes to the conflicts created by the Ninth Circuit's alternative holding. Indeed, although we explained how that holding contravenes this Court's rulings that even state law claims conferring "non-negotiable state-law rights" are preempted *unless* they are sufficiently independent of the CBA (Pet. 23-25), respondents do not address this fundamental conflict.[9]

b. Attempting to deny the circuit conflict created by the en banc Ninth Circuit's alternative holding, respondents argue that the decision below is "entirely consistent" with a number of decisions of other federal circuits holding that various claims were not preempted by § 301. Opp. 20. *See id.* at 20-23 & n.6. *None* of the cases cited by respondents, however, involved workplace privacy claims. Moreover, each of those decisions dealt with claims that—unlike respondents' privacy claims here—were clearly outside the scope of a CBA. The claims held not preempted were either those involving assault, battery, or other conduct not "an ordinary subject of bargaining," *Amoco*, 964 F.2d at 710, *see e.g.*, *Peterson* v. *BMI Refractories*, 132 F.3d 1405, 1413 (11th Cir. 1998); *Anderson* v. *Ford Motor Co.*, 803 F.2d 953, 958-959 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987), or those brought for wrongful discharge or discrimination under state laws that did not require reference to a CBA for

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[CBA]." Opp. 16 (emphasis in original). That attempt fails because whether respondents had "a reasonable expectation of privacy on [their] part"—which cannot be determined without reference to the CBA—is clearly one of the *elements* of a privacy claim which respondents must prove to prevail. *Hill*, 865 P.2d at 655.

[9] That conflict provides a compelling basis for review, particularly as it generates uncertainty concerning the enforcement of nationwide CBAs—like the one in this case—which commonly deal with issues of workplace privacy. *See* Pet. 27-30. Under the Ninth Circuit's approach, unions and employers would have to search laws state by state before agreeing to a CBA.

their application. *See, e.g.*, *Kohl's Food Stores, Inc.* v. *Hyland*, 32 F.3d 1075, 1078 (7th Cir. 1994); *Knafel* v. *Pepsi Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1482 (6th Cir. 1990). In any event, to the extent any of the decisions cited by respondents is in fact "entirely consistent" with the decision below, as respondents assert, that would only deepen the circuit conflict and thus heighten the need for this Court's review.[10]

c. Respondents also purport to take Consolidated to task for asserting that other federal circuits have "uniformly" held that § 301 preempts workplace privacy claims. Opp. 23 (quoting Pet. 25). Respondents' reproof is based on two cases in which courts held that privacy claims were not preempted. *See* Opp. 23-24. Neither of those cases, however, involved *workplace* privacy claims.

In *Schmidt* v. *Ameritech Corp*, 115 F.3d 501 (7th Cir. 1997), for instance, an employee brought an invasion of privacy claim against his employer for monitoring his telephone calls while he was on a leave of absence. In holding that his claim was not preempted, the court noted that the employee "[was] not making any claim about surveillance of his workplace telephone [or] his workplace environment," but rather a claim that he "had the same right to protection for his customer information as all other [of his employer's] customers." *Id.* at 504, 505. Similarly, in *Keehr* v. *Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987), an employee brought an invasion of privacy claim based on a supervisor's rude comments about his wife. That claim obviously had nothing to do with an invasion of

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[10] Respondents contend that each of those decisions "adopted a rule that lawsuits arising out of prohibited activity by an employer are not preempted." Opp. 22. Not one of those decisions, however, held that a claim was preempted merely because the conduct involved was allegedly unlawful.

"workplace" privacy. Thus, in stark contrast to this case, in these two cases there was clearly no need to interpret the CBA to resolve the plaintiffs' claims.

d. Finally, respondents attempt to distinguish the workplace privacy decisions with which the en banc Ninth Circuit's alternative holding conflicts on the ground that they apparently did not involve allegations of criminal conduct. *See* Opp. 24-26. For the reasons discussed above, respondents' reliance on § 653n to distinguish these cases is simply misplaced.[11]

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For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted, and the judgment reversed.

Respectfully submitted,

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[11] Even if these cases were somehow distinguishable, the Ninth Circuit's alternative holding would still conflict with decisions holding that claims based on conduct that might have been criminal were nevertheless preempted by § 301. *See* Pet. 26 (discussing cases).